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NORTH CAROLINA REPORTS

VOL. 176

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

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FALL TERM, 1918

ROBERT C. STRONG
REPORTER

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1918

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

PLATT D. WALKER,
GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
H. W. Whedbee*	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
W. P. Stacy	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

*Succeeded by O. H. Guion, New Bern. Appointed December 20, 1918.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
M. H. Justice	Eighteenth	Rutherford.
Frank Carter*	Nineteenth	Buncombe.
G. S. Ferguson	Twentieth	Haywood.

*Succeeded by P. A. McElroy, Marshall. Appointed August 3, 1918.

SOLICITORS

EASTERN DIVISION

J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
J. Lloyd Horton	Fifth	Pitt.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. L. Lyon	Eighth	Columbus.
S. B. McLean	Ninth	Robeson.
S. M. Gattis	Tenth	Orange.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
W. E. Brock	Thirteenth	Anson.
G. W. Wilson	Fourteenth	Gaston.
Hayden Clement	Fifteenth	Rowan.
R. L. Huffman	Sixteenth	Caldwell.
J. J. Hayes	Seventeenth	Wilkes.
Michael Schenck	Eighteenth	Henderson.
J. W. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

FALL TERM, 1918

The following were licensed to practice law by the Supreme Court, Fall Term, 1918:

Cecil Graham Best	Warsaw, N. C.
Frank Warren Brown	Raleigh, N. C.
Jackson Joshua Clemmons	Washington, N. C.
Ralph Duffer	Raleigh, N. C.
Solomon W. Eason	Raleigh, N. C.
Joseph Asheley Edgerton	Rocky Mount, N. C.
Oscar Ogburn Efird	Winston-Salem, N. C.
James Robert Evans	Southport, N. C.
Judah Lawrence Emanuel	Washington, D. C.
Carl Finger	Gastonia, N. C.
Newton Gabe Fonville	Raleigh, N. C.
Charles Everett Hamilton	Winston-Salem, N. C.
Norman Benjamin Hedgepeth	Louisburg, N. C.
Clyde Oscar Polycarp Hughey	Raleigh, N. C.
Herbert Shepperd Joyner	Petersburg, Va.
Frank Hunter Kennedy	Houstonville, N. C.
Thomas Donovan Luther	Candler, N. C.
Carrie Lee McLean	Charlotte, N. C.
William Brown McQueen	Raeford, N. C.
Max Meyer	Enfield, N. C.
Philip Arendell Moore	Kinston, N. C.
Lawrence Emmett Nichols	Raleigh, N. C.
Quincy Kellogg Nimocks	Fayetteville, N. C.
John Lansing Pearse	Manteo, N. C.
Earle Prevette	No. Wilkesboro, N. C.
David Atwell Rendleman	Salisbury, N. C.
Edward Croswell Robinson	Garland, N. C.
Lilian Morton Baugh Rodgers	Wilmington, N. C.
William Hamilton Sawyer	Raleigh, N. C.
Chesley Sedberry	Wadesboro, N. C.
Elijah Hermous Smith	Southport, N. C.
Alpheus Wray White	Raleigh, N. C.
Edgar John Wicker	Raleigh, N. C.
Arthur Robinson Williams	Greensboro, N. C.
Orin Rodolphus York	High Point, N. C.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1919

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1919
First District	February 4
Second District	February 11
Third and Fourth Districts	February 18
Fifth District	February 25
Sixth District	March 4
Seventh District	March 11
Eighth and Ninth Districts	March 18
Tenth District	March 25
Eleventh District	April 1
Twelfth District	April 8
Thirteenth District	April 15
Fourteenth District	April 22
Fifteenth and Sixteenth Districts	April 29
Seventeenth and Eighteenth Districts	May 6
Nineteenth District	May 13
Twentieth District	May 20

SUPERIOR COURTS, SPRING TERM, 1919

The parenthesis numerals following the date of a term indicates the number of weeks during which the term may hold.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Devin*

Pasquotank—Dec. 30† (2); Feb. 10† (1); Mar. 17 (1).
Washington—Jan. 13 (1); June 2 (2).
Perquimans—Jan. 20 (1); Apr. 14 (1).
Currituck—Jan. 27† (1); Mar. 3 (1).
Beaufort—Feb. 17†(2); Apr. 7† (1), May 5 (2).
Camden—Mar. 10 (1).
Gates—Mar. 24 (1).
Chowan—Mar. 31 (1).
Tyrrell—Apr. 21 (2).
Hyde—May 19 (1).
Dare—May 26 (1).

SECOND JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Bond*

Wilson—Jan. 13 (1); Feb. 3† (2); May 12† (2); June 23† (1).
Nash—Jan. 20 (1); Feb. 24† (1); Mar. 10 (1); Apr. 28* (1); May 5† (1); May 26† (1).
Edgecombe — Mar. 3 (1); Mar. 31† (2); June 2 (2).
Martin—Mar. 17 (2); June 16 (1).

THIRD JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Connor*

Warren—Jan. 13 (2); May 19 (2).
Halifax—Jan. 27 (2); Mar. 17 (2); June 2 (2).
Bertie—Feb. 10 (1); May 5 (2).
Hertford—Feb. 24 (1); Apr. 14 (2).
Vance—Mar. 3 (2); June 16 (2).
Northampton—Mar. 31 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Kerr*

Harnett—Jan. 6 (1); Feb. 3† (2); May 19 (1).
Chatham—Jan. 13 (1); Mar. 17† (1); May 12 (1).
Wayne—Jan. 20 (2); Apr. 7† (2); May 26 (2).
Johnston—Feb. 17† (2); Mar. 10 (1); Apr. 21 (2).
Lee—Mar. 24 (2); May 5 (1).

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Daniels*

Craven—Jan. 6* (1); Feb. 3† (2); Apr. 7‡ (1); May 12† (1); June 2* (1).
Pitt—Jan. 13† (2); Mar. 17 (2); Apr. 14 (2); May 19† (1); May 26† (1).
Greene—Feb. 24 (2); June 23 (1).
Carteret—Mar. 10 (1); June 9 (2).
Jones—Mar. 31 (1).
Pamlico—Apr. 28 (2).

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Whedbee*

Duplin—Jan. 6† (2); Jan. 27* (1); Mar. 24† (2).
Lenoir—Jan. 20* (1); Feb. 17† (2); Apr. 7 (1); May 19* (1); June 9† (2).
Sampson—Feb. 3 (2); Mar. 10† (2); Apr. 28 (2).
Onslow—Mar. 3 (1); Apr. 14† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Allen*

Wake—Jan. 6* (1); Jan. 27† (3); Mar. 3* (1); Mar. 10† (2); Mar. 31† (3); Apr. 21* (1); Apr. 28† (2); May 19† (2); June 9† (3).
Franklin—Jan. 13 (2); Feb. 17† (2); May 12 (1).

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Calvert*

New Hanover—Jan. 13* (1); Feb. 3† (2); Mar. 31* (1); Apr. 7† (1); Apr. 14† (1); May 5 (1); May 19† (2); June 23* (1).
Pender—Jan. 20 (1); Mar. 3† (2); June 2 (1).
Columbus—Jan. 27 (1); Feb. 17† (2); Apr. 21 (2).
Brunswick—Mar. 17 (1); June 16† (1).

NINTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Stacy*

Bladen—Jan. 6‡ (1); Mar. 10* (1); Apr. 21† (1).
Cumberland—Jan. 13* (1); Feb. 10† (2); Mar. 17† (2); Apr. 28‡ (2); May 26* (1).
Hoke—Jan. 20 (1); Apr. 14 (1).
Roberson—Jan. 27* (1); Feb. 3† (1); Feb. 24† (2); Mar. 31† (2); Mar. 12† (2).

TENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Lyon*

Durham—Jan. 6† (2); Feb. 24* (1); Mar. 10† (2); Apr. 28† (1); May 19* (1); June 16† (1).
Alamance—Jan. 20† (1); Mar. 3* (1); May 26† (2).
Person—Feb. 3 (1); Apr. 21 (1).
Granville—Feb. 10 (2); Apr. 7 (2).
Orange—Mar. 31 (1); May 5† (1).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Ferguson*

Forsyth—Dec. 30† (1); Jan. 6*† (1); Jan. 13*† (1); Feb. 10† (2); Mar. 10† (2); Mar. 24* (1); May 19† (3).
Rockingham—Jan. 20* (1); Feb. 24† (2); May 12 (1); June 16† (2).
Surry—Feb. 3 (1); Apr. 21 (2).
Caswell—Mar. 31 (1).
Ashe—Apr. 7 (2).
Alleghany—May 5 (1).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Lane*

Guilford—Jan. 13† (2); Jan. 27* (1); Feb. 10† (2); Mar. 10† (2); Mar. 24† (1); Apr. 14† (2); Apr. 28* (1); May 12† (2); June 9† (1); June 16* (1).
Davidson—Feb. 24 (2); May 5† (1); May 26 (2).
Stokes—Mar. 31* (1); Apr. 7† (1).

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Shaw*

Richmond—Jan. 6* (1); Apr. 7* (1); May 26† (1); June 16† (1); Mar. 17† (1).
Anson—Jan. 13* (1); Mar. 3† (1); Apr. 14 (1); Apr. 21† (1); June 9† (1).
Moore—Jan. 20* (1); Feb. 10† (1); May 19† (1).
Union—Jan. 27 (1); Feb. 17† (2); Mar. 24 (1); May 5† (1).
Stanly—Feb. 3† (1); Mar. 31 (1); May 12† (1).
Scotland—Mar. 10† (1); Apr. 28* (1); June 2 (1).

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Adams*

Mecklenburg—Jan. 6* (2); Feb. 3† (2); Feb. 17* (1); Feb. 24† (3); Mar. 24* (1); Mar. 31† (2); Apr. 28† (2); May 12* (1); May 26† (2); June 9* (1); June 16† (1).
Gaston—Jan. 20 (2); Mar. 17* (1); Apr. 14† (2); May 19* (1).

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Harding*

Cabarrus—Jan. 6 (2); Apr. 21 (2).
Montgomery—Jan. 20* (1); Apr. 7† (2).
Iredell—Jan. 27 (2); May 19 (2).
Rowan—Feb. 10 (2); Mar. 10† (1); May 5 (1).
Davie—Feb. 24 (2).
Randolph—Mar. 17† (2); Mar. 31* (1).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Long*

Lincoln—Jan. 27 (1).
Caldwell—Feb. 24 (2); May 19† (2).
Burke—Mar. 10 (2).
Cleveland—Mar. 24 (2).
Polk—Apr. 14 (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Webb*

Wilkes—Jan. 20† (2); Mar. 10 (2).
Catawba—Feb. 3 (2); May 5† (2).
Alexander—Feb. 17 (1).
Yadkin—Mar. 3 (1).
Watauga—Mar. 24 (2).
Mitchell—Apr. 7 (2).
Avery—Apr. 21 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Cline*

McDowell—Jan. 20† (2); Feb. 17 (2).
Rutherford—Feb. 3† (2); Apr. 28 (2).
Henderson—Mar. 3* (2); May 26† (2).
Yancey—Mar. 24 (2).
Transylvania—Apr. 14 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Justice*

Buncombe—Jan. 13 (3); Feb. 3† (3); Mar. 3 (3); Mar. 31,† '18 (1); Apr. 7,† '19 (4); May 5 (3); June 2† (3).
Madison—Feb. 24 (1); Mar. 24 (1); Apr. 21, '18 (2); Apr. 28, '19 (1); May 26 (1).

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1919—*Judge Carter*

Haywood—Jan. 6† (2); Feb. 3 (2); May 5† (2).
Cherokee—Jan. 20 (2); Mar. 31 (2).
Jackson—Feb. 17 (2); May 19† (2).
Swain—Mar. 3 (2).
Graham—Mar. 17 (2).
Clay—Apr. 14 (1).
Macon—Apr. 21 (2).

*Criminal cases. †Civil cases. ‡Civil and jail cases.

Compiled from the Calendar of A. B. Andrews, of the Raleigh bar, with his permission.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—Henry G. Connor, *Judge*, Wilson.
Western District—James E. Boyd, *Judge*, Greensboro.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. Ashe, Clerk.

Elizabeth City, second Monday in April and October. J. P. Thompson, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. Arthur Mayo, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. Walter Duffy, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. T. M. Turrentine, Deputy Clerk, Wilmington.

Laurinburg, last Monday in March and September.

Wilson, first Monday in April and October.

OFFICERS

J. O. Carr, United States District Attorney, Wilmington.

E. M. Greene, Assistant United States District Attorney, New Bern.

W. T. Dortch, United States Marshal, Raleigh.

S. A. Ashe, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

WESTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Greensboro, first Monday in June and December.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. Hyams, Deputy Clerk, Asheville.

Charlotte, first Monday in April and October.

Salisbury, fourth Monday in April and October.

Wilkesboro, fourth Monday in May and November.

OFFICERS

William C. Hammer, United States District Attorney, Asheboro.

Clyde R. Hoey, Assistant United States District Attorney, Charlotte.

Charles A. Webb, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

FALL TERM, 1918

W. A. CRISP v. W. H. BIGGS.

(Filed 11 September, 1918.)

Estates—Rule in Shelley's Case—"Nearest Heirs"—Fee Simple.

An estate to M., "in fee simple, all the days of his life, then it shall descend to his nearest heirs," vests in M. a fee simple title, under the rule in *Shelley's Case;* the words, "nearest heirs," meaning simply the word "heirs." The history and meaning of the rule in *Shelley's Case,* and its value at the present day, discussed by CLARK, C. J.

APPEAL from *Kerr, J.*, at June Term, 1918, of MARTIN, on a controversy without action, under Revisal, 803.

Critcher & Critcher for plaintiff.
Wheeler Martin for defendant.

CLARK, C. J. Jesse Mizelle devised the tract of land in question to his son, Hardy Mizelle, "to have and to hold in fee simple all the days of his life, then it shall descend to his nearest heirs." The plaintiff was the grantee of Hardy Mizelle, and, having contracted to convey the same to the defendant, tendered him a deed. The latter refused to accept, upon the ground that the plaintiff could not convey a fee-simple title. This raises the simple question whether the devise to Hardy Mizelle was in fee simple.

The rule in *Shelley's Case* was first stated, 1 Coke, 104, in 1581, and is as follows: "When an ancestor, by any gift or conveyance, taketh an

estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not a word of purchase." Applying this rule, there can be no controversy that Hardy Mizelle, under the devise in question, held the land in fee simple.

The rule in *Shelley's Case* is an exception to the general rule that a will must be construed according to the evident intent of the devisor, and substitutes for it an arbitrary rule of law which makes that a devise in fee simple which was evidently intended to be for life only, with remainder over.

In *Cohoon v. Upton,* 174 N. C., 90, it is stated that the rule was created to preserve to the feudal lord certain fees and perquisites which accrued to him when land passed to the heir by inheritance, but of which the lord would be deprived if the land passed from a life tenant to his son as purchaser. In the concurring opinion in that case (p. 91) the history of the original decision was given and the motive for it, which was to preserve the feudal lords from the loss of the wardship of minor heirs and other profits accruing to the lord upon the descent of lands. The rule was first reported, 1 Coke's Reports, 93-B, and has been rigorously adhered to, except in *Perrin v. Blake,* in the King's Bench, which was reversed in the Exchequer Chamber, 4 Burr., 2579; Bl. Rep., 672; Dougl., 329. The rule now serves an excellent, but an entirely different, purpose in this State, in that it prevents the tying-up of real estate by making possible its transfer one generation earlier, and also subjecting it to the payment of the debts of the first taker. It is doubtless for this reason that the rule has never been repealed in North Carolina.

It may be of some interest to the profession to quote from Lord Campbell's Life of Sir Edward Coke the following professional statement of the manner in which the rule was originally laid down: "Edward Shelley, being seized in tail general, had two sons, Henry and Richard. Henry died, leaving a widow *enceinte.* Edward suffered a recovery to the use of himself for life, remainder to the use of the heirs male of his body and the heirs male of such heirs male, and died before his daughter-in-law was delivered. Richard, the younger son, as the only heir male *in esse,* entered. The widow then gave birth to a son; and the great question was, whether he had a right to the estate rather than Richard, his uncle. It was an acknowledged rule that the title of one who takes by *purchase* cannot be divested by the birth of a child after his interest has vested in possession; but that the estate of one who takes by *descent* may. The point, therefore, was 'whether Richard, under the uses of the recovery, took by purchase or by descent.' The case excited so much interest at the time that, by the special order of Queen Elizabeth, it was adjourned from the Court of Queen's Bench, where it arose, into the

Exchequer Chamber, before the Lord Chancellor and the twelve judges. Coke was counsel for the nephew, and succeeded in establishing the celebrated rule."

The establishment of this rule was of the utmost importance to the owners of land under the feudal system, and gave to Coke, who was chiefly instrumental in procuring its establishment, such prestige that Lord Campbell says that "Thenceforth, while he remained at the bar, he was employed in every case of importance which came on in Westminster Hall, and he was in the receipt of an immense income, which gave him greater power of buying land than is enjoyed even by an eminent railway counsel at the present day. He began to add manor to manor, till at length it is said the crown was alarmed lest his possessions should be too great for a subject. According to a tradition in the family, in consequence of a representation from the Government (which in those times often interfered in the private concerns of individuals) that he was monopolizing injuriously all land which came into the market in the County of Norfolk, he asked and obtained leave to purchase 'one acre more,' whereupon he became proprietor of the great 'Castle Acre' estate, of itself equal to all his former domains." This last statement, however, rests on tradition and does not seem reasonable.

Though the feudal tenures, with their oppressive incidents, which Blackstone enumerates as seven in number—"aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat" (2 Com., 63)—were abolished in 1660 as one of the conditions for the restoration of Charles II to the throne, the rule has been so beneficial, as above stated, in making possible the transfer of land a generation earlier and subjecting it to liability for the debts of the first taker, that in England, and also in this State and many others, it remains in force, notwithstanding that often it may be contrary to the intent of the devisor or grantor to confer an estate, for life only, on the first taker. The words, "nearest heirs," means simply "heirs," and do not take this case out of the rule.

Affirmed.

M. D. LEGGETT ET AL. v. F. M. SIMPSON ET AL.

(Filed 11 September, 1918.)

Estates—Wills—Devise—Remainders—Class—Per Capita—Contingencies—Children—Ulterior Devise.

A devise of lands to certain named of the testator's nieces for life, remainder to their children, but should they die without leaving children, then over to an ulterior devisee, and one of them die without children,

survived by the other and her children, the surviving niece takes, and after her death her children take, and the ulterior devisee takes nothing, as the contingency has not happened upon which he could acquire an interest under the terms of the will.

APPEAL by plaintiffs from *Connor, J.*, at August Term, 1918, of WASHINGTON.

This was a proceeding for partition, begun before the clerk, and heard on appeal by *Connor, J.*, at August Term, 1918, of WASHINGTON.

Small, MacLean, Bragaw & Rodman for plaintiffs.
Ward & Grimes for defendants.

CLARK, C. J. The only question presented depends upon the construction of the following clauses in the will of U. W. Swanner:

"I lend to my nieces, Elizabeth Bateman, wife of John Daniel Bateman, and to Charlotte Baxter, wife of Samuel Baxter, all of the tract of land whereon I now live, and all other lands I own, except the tracts or parcels devised in former items, for and during the terms of their natural lives.

"I give and devise to the lawful children of my nieces, Elizabeth Bateman and Charlotte Baxter, all the lands which I have loaned in a former item to my nieces, Elizabeth Bateman and Charlotte Baxter, to have and to hold to them in fee simple forever, at the death of my aforesaid nieces.

"In the event that my nieces, Elizabeth Bateman and Charlotte Baxter, should die without leaving any lawful children, then it is my wish and desire that the land devised in a former item to them shall go to the children of my sister, Martha Perry, and Sallie Leggett, and to have and to hold to them in fee simple forever."

Elizabeth Bateman died, without having had issue, in 1915. The plaintiffs are the children of Martha Perry and Sallie Leggett, sisters of the testator, named in the will. The defendants are the children of Charlotte Baxter, named in the will, and their grantees. The other items of the will have no bearing on this controversy.

His Honor properly held that the plaintiffs, the children of Martha Perry and Sallie Leggett, were not owners of any right or title in the lands in question, and denied the prayer for partition.

There is nothing in the will which impairs the usual rule of construction that where a devise is to a class collectively, and not by name to various devisees in the class, all the members of the class take *per capita* and not *per stirpes*.

The devise to the "children of my nieces, Elizabeth Bateman and Charlotte Baxter," was to them as a class, and if they had had an

unequal number of children, the children of the two would have taken as one class *per capita.*

Even a devise to a father and his children is a devise to them as a class *per capita.*

As early as 41 Elizabeth, in *Wild's Case,* 6 Rep., 17, it was held: "If a man devise land to A. and his children or issue, and he then has issue of his body, . . . they shall have a joint estate." This doctrine has been followed in *Moore v. Leach,* 50 N. C., 88, and numerous cases cited thereto in the Anno. Ed. See especially *Silliman v. Whitaker,* 19 N. C., 89, where the matter is fully discussed. To same purport, *Rice v. Klette,* 149 Ky., 787, reported with very full annotations, L. R. A., 1917, B, page 74.

The same ruling was made as to conveyances, *Cullens v. Cullens, Brown, J.,* 161 N. C., 344, reported with very complete citations, L. R. A., 1917, B, page 74.

Elizabeth Bateman having died without children, the land went to Charlotte Baxter, and after her death to her children, and they and their grantees are the sole owners thereof.

The devise over to the children of his sisters, Martha Perry and Sallie Leggett, was contingent upon the death of his nieces, Elizabeth Bateman and Charlotte Baxter "without leaving any lawful children living," which contingency did not happen, and the plaintiffs therefore take nothing. *Kirkman v. Smith,* 174 N. C., 603.

Affirmed.

E. P. CAHOON v. D. O. BRINKLEY.

(Filed 11 September, 1918.)

1. **Judgments— Excusable Neglect— Motions— Different County— Courts— Jurisdiction.**

   Exception to the hearing of a motion to set aside, for excusable neglect, a judgment rendered in another county, is to the jurisdiction, affects a substantial right, and may not be entertained without the consent of the parties.

2. **Judgments—Motions—Excusable Neglect—Attorney and Client—Attorney's Change of Residence—Notice—Calendar.**

   Where the defendant has employed counsel to represent him in an action, and for ill health the counsel has since moved permanently to another State, it is notice to the client and it becomes his duty to get another attorney to represent him; and when he has been duly served with summons, complaint filed, and the cause duly calendared for trial, it is notice thereof to him, and after judgment his laches is not excusable, and his motion to set it aside should be denied.

3. Same—Copy of Pleadings.

Where the plaintiff's attorney has promised the defendant's attorney to furnish him with a copy of the complaint, and the latter attorney has permanently left the State, the defendant's laches in failing to get another attorney to represent him is not excused by the failure of the plaintiff's attorney to furnish the promised copy.

4. Appeal and Error—Judgments—Motions—Excusable Neglect—Findings—Meritorious Defense—Duty of Defendant.

The action of the trial judge in setting aside a judgment for excusable neglect will not be sustained on appeal, in the absence of a proper finding of a meritorious defense; the burden of this finding being upon the defendant, appellee.

5. Judgments, Irregular.

Where a cause of action is at issue and regularly set on the calendar, and tried upon the issues before the jury, and judgment rendered in open court, it is not objectionable as an irregular judgment.

APPEAL by plaintiff from *Bond, J.*, allowing a motion by defendant, made at Elizabeth City, 12 February, 1918, to set aside a verdict and judgment for the plaintiff, rendered at November Term, 1917, of TYRRELL, upon the ground of excusable neglect.

Meekins & McMullan for plaintiff.
Ward & Grimes for defendant.

CLARK, C. J. This was a motion to set aside a verdict and the judgment rendered thereon, for excusable neglect. The verdict and judgment were rendered at November Term, 1917, of Tyrrell. The motion to set aside for excusable neglect was heard over exception by plaintiff at Elizabeth City, 12 February, 1918.

The summons in the action, returnable to Tyrrell, was issued in May, 1915, and complaint was filed 15 September, 1917. An order extending time to file pleadings was made at each term, down to that time. The defendant employed W. M. Bond, Jr., then practising at Plymouth, in Washington County, to represent him, and at Bond's request I. M. Meekins, plaintiff's attorney, agreed to furnish Bond a copy of the complaint when filed. In August, 1916, Bond, by reason of ill health, moved permanently to Denver, Colorado, when necessarily his connection with the case had ceased, and therefore no copy of the complaint was furnished him. The complaint was filed 15 September, 1917, and the case was calendared for trial at the October Special Term, 1917, and was then continued till the November Term. The case was then again calendared for trial at the regular November Term, 1917, when it was heard and verdict and judgment regularly rendered.

The plaintiff excepts to the allowance of the motion to set aside the judgment for excusable neglect, on three grounds, either of which, we think, entitles the plaintiff to have the judgment reversed.

1. The motion was made at Elizabeth City, outside of the county where the judgment was rendered. The plaintiff entered a special appearance and moved to dismiss, and also pleaded defect of jurisdiction or power in the judge to hear said motion at such time and place, without the plaintiff's consent, and excepted to the refusal to dismiss.

It is well settled by our decisions that no order affecting the substantial right of the parties can be rendered outside the county wherein such action is pending, except in those cases especially provided by statute, or by consent of both parties. There is no statutory provision which permits a motion of this kind to be heard out of the county where the verdict and judgment were rendered, and the motion should have been dismissed. *Bynum v. Powe,* 97 N. C., 378; *McNeill v. Hodges,* 99 N. C., 248, and cases cited thereto in the Anno. Ed.; *Bank v. Peregoy,* 147 N. C., 293; *Cox v. Borden,* 167 N. C., 320.

This matter is fully discussed in *Bank v. Peregoy, supra,* where the Court says: "Except by consent or in those cases for which special provision is made by statute, a judge of the Superior Court, even in his own district, has no jurisdiction to hear a case, or make orders therein, outside the county in which the action is pending."

In *Godwin v. Monds,* 101 N. C., 354, the Court held that the judge "has no jurisdiction to hear and determine a motion to set aside a judgment outside the county in which the action is pending, except by consent of the parties thereto." See citations to that case in Anno. Ed. This case was cited and followed as authority, without an opinion, in *Taylor v. Pope,* 101 N. C., 368. Among the cases citing it is *Herring v. Pugh,* 126 N. C., 860, which says: "In *Godwin v. Monds,* 101 N. C., 354, it is held that a judgment could not be set aside by a judge outside the county in which it was rendered, unless it was done by common consent, and that that consent should appear in writing, or the judge should set out the consent in the order which he makes in the cause, or such consent should appear by fair implication from what appeared in the record. See, also, *Ledbetter v. Pinner,* 120 N. C., 457; *Fertilizer Co. v. Taylor,* 112 N. C., 145." The defect was jurisdictional, and the motion should have been dismissed, for in this case the plaintiff not only did not consent, but asked to dismiss, and excepted.

2. It was also error to hold that the neglect of the defendant was excusable and entitled him to have the judgment set aside. This Court has held that "When a man has business in court, the best thing he can do is to attend it." *Pepper v. Clegg,* 132 N. C., 316, and this has been often quoted and reaffirmed. It has also been held that "A litigant

must pay the same attention to a case in court that any one would give to business of importance." *Roberts v. Alman,* 106 N. C., 391. Even when he has employed counsel, he cannot abandon all attention to the case (*McLeod v. Gooch,* 162 N. C., 122), and in this case the defendant well knew he had no counsel. It has also been held that one who has been made party to an action by summons is fixed with notice of all orders and proceedings taken in open court. *LeDuc v. Slocomb,* 124 N. C., 347.

In this case the judge finds as a fact that Bond, the defendant's counsel, removed permanently to Denver, Colorado, in August, 1916; that after the complaint was filed in September, 1917, this case was calendared for trial at October Special Term, 1917, of Tyrrell; that the cause was continued and again calendared for trial at the regular November Term, 1917; that the case was reached in regular order on the calendar, regularly tried, and judgment entered upon the verdict. The judge finds as a fact that the removal of the defendant's counsel to Colorado was a matter of sufficient public notoriety not only to be generally known, but that his new address could have been easily ascertained.

If the defendant's counsel had died it would have been the duty of the defendant to have obtained counsel at once in his stead to represent him in this cause. The removal of said counsel to Colorado was of the same notoriety and effect and the defendant had the same notice to procure counsel in his stead. He well knew that his counsel could not and would not attend to the case after his removal to Colorado. It was not paying the attention to the case that an ordinarily prudent man would pay to his most important matters to take no steps to procure counsel from August, 1916, down to the trial in November, 1917.

"Where the defendant's counsel died having filed no answer, and the case was continued to the next term, and it was calendared for trial at that term, and judgment was taken, the defendant not having employed another counsel, it was held that the judgment could not be set aside, for the neglect was inexcusable." *Simpson v. Brown,* 117 N. C., 482; *Kivett v. Wynne,* 89 N. C., 39.

In this case, the defendant's counsel having permanently moved to another State, it was the duty of the defendant to employ other counsel, as much so as if the counsel had died, especially so in this case as there were sixteen months between the removal of the counsel and the trial and the case was twice calendared for hearing.

Where the defendant employs a counsel nonresident in this State, or even counsel in this State who does not reside in the county of trial, or who does not habitually attend that court, the judgment, for want of an

answer, will not be set aside, for such neglect is inexcusable. *Manning v. R. R.,* 122 N. C., 824, and cases cited in Anno. Ed.

In this case the negligence was not that of counsel in failing to attend to the matter, but the negligence of the party himself in not employing counsel when for sixteen months he had notice that his counsel had permanently left the State. Even where there has been negligence of counsel, the judgment will not be set aside if the client himself has been neglectful. *Norton v. McLaurin,* 125 N. C., 185, which cites many cases in support of that decision and which has itself been cited many times since as authority. Besides that, when the case was calendared for trial at the October Special Term, 1917, this was an order of which he was fixed with notice. Such calendars are usually printed in the papers, and if it was not done in this case the calling of the cause in regular order on the calendar with the order "continued till next term" was a sufficient notice that this case stood for trial and would stand for trial again at the November term. The defendant was fixed with notice of this order. *LeDuc v. Slocomb,* 124 N. C., 347. This is elementary.

Then there was the further notice by the case being put on the calendar for trial at the November term, of which calendar the public had notice; yet during all these months, from August, 1916, to November, 1917—sixteen months—the defendant in utter neglect of his duties as a litigant in court, and with full knowledge that his former counsel had departed the State and removed his residence permanently to Colorado, did not employ counsel to represent him, which was the grossest negligence on the part of the defendant.

If the defendant was aware that there was an agreement that a copy of the complaint when filed should be sent to his counsel, he well knew that after said counsel had removed his residence permanently to Colorado that such complaint could not be sent to him, and that if sent said counsel could not attend to the matter. He knew that it was necessary for him to employ new counsel. There was no new counsel on whom to serve the complaint, and though the case was twice calendared for trial he took no notice whatever of the pending case. He did not look after it himself, and during sixteen months he employed no one among the many able and well-known counsel attending Tyrrell court to represent him. It was not incumbent on the plaintiff to notify him to get other counsel.

The conversation in Norfolk is stated differently by witnesses, and its purport is not found by the judge. The plaintiff testifies that it was after Bond left the State and was a notice to Brinkley to get other counsel. The defendant contends that it was before Bond left, and admitted the agreement to serve the complaint on Bond, which of course could have no effect after Bond had ceased to be counsel by his removal from

the State and the lapse of ample time for the defendant to engage other counsel.

3. A judgment cannot be set aside for excusable neglect unless the judge finds that the defendant has a meritorious defense. *Stockton v. Mining Co.,* 144 N. C., 595, and cases there cited, and cases thereto cited in the Anno. Ed.

In *Jarman v. Saunders,* 64 N. C., 370, it is said: "Under the former system a court of law could not set aside its regular judgment at a subsequent term." The remedy was by bill in equity, in which it was requisite to show that the mover had a meritorious defense, and this the judge must still find. *LeDuc v. Slocomb,* 124 N. C., 351; *Mauney v. Gidney,* 88 N. C., 200. There are numerous cases to the same effect: *Minton v. Hughes,* 158 N. C., 587; *Miller v. Curl,* 162 N. C., 4; *Allen v. McPherson,* 168 N. C., 435; *Estes v. Rash,* 170 N. C., 342.

The burden was on the defendant to have the judge find the fact that there is a meritorious defense. *School v. Pierce,* 163 N. C., 424.

Upon each and every one of these grounds the order setting aside the judgment was erroneous.

There is no evidence for finding that the judgment was taken irregularly. The cause was set regularly for trial upon the calendar at the October term. It was continued and again set for trial on the calendar at November term. At that term it was regularly reached in regular order. The issues were submitted to the jury and found as appears in the record and the judgment was entered regularly in open court upon such verdict.

The order setting aside the judgment in this cause should be Reversed.

MINNIE COTTEN ET AL. V. W. R. AND C. L. JOHNSTONE.

(Filed 11 September, 1918.)

Conversion — Lands—Trees—Counties—Roads and Highways—Contracts—Torts.

Where it is admitted that the owner of lands had given by parol to the county a right of way over them for a roadway, which was being constructed by the defendant under contract with the county, and the statute of frauds is not pleaded or relied upon, the gift of the land carries with it the trees, etc., thereon; and the owner, the plaintiff in the action, may not recover of the defendant for the tops and laps of these severed trees that had been used by the defendant's employees as firewood during the construction of the road, as for wrongful conversion, or otherwise.

APPEAL by plaintiffs from *Daniels, J.,* at April Term, 1918, of EDGECOMBE.

James M. Norfleet and Donnell Gilliam for plaintiffs.
Allsbrook & Philips for defendants.

CLARK, C. J. The county commissioners having decided to straighten a road which would go over the timbered part of land belonging to the plaintiffs, a right of way 1260 x 40 feet was laid off by the road superintendent. The plaintiffs gave the land to the county and agreed that the defendants, who were working the road under the road superintendent, might pitch their camp upon the land. The defendants had contracted with the county to construct the road, charging so much for team, labor, etc. The defendants cut the trees and underbrush upon the right of way and moved them out upon the plaintiffs' land. The plaintiffs state in their brief that they do not complain of cutting the trees or putting them upon their land, but that the defendants used the timber taken off the right of way for firewood. It was in evidence that while the defendants were constructing the road, in the winter and spring of 1917, the weather was very wet and cold, and the laborers used the tops and laps of these trees for cooking and for drying the laborers when returning from their work. They rolled the trunks of the trees to one side and burned in their campfires some of the laps and limbs which had been cut off.

The Court intimated that it would charge the jury that the plaintiffs' cause of action, if any, was against the county of Edgecombe and not against these defendants, whereupon the plaintiffs submitted to a nonsuit and appealed.

It is true that land cannot be conveyed by parol, but the plaintiffs admit that they granted the right of way to the county, and do not plead the statute of frauds. They stood by for months and saw the trees cut down and removed by the defendants under the direction of the county authorities, and the laps and tops burnt without objection.

The only exception filed by the plaintiffs is that "The court erred in holding that plaintiffs could not recover of the defendants, as tort feasors, for the conversion of the trees after they had been cut on the right of way and hauled and placed on plaintiffs' land, there being no liability upon the county, as the trees were cut by consent of the plaintiffs, and no part of the same was used for the repair or construction of said road; the action being in effect for the wrongful conversion, and not for the cutting of the trees." This exception is argumentative, but it will be seen that the plaintiffs rest their case entirely upon the ground that the county could not permit the defendants to use the laps and tops and underbrush cut from the right of way for firewood, though admitting, it seems, that the county might have used such timber in the repair or construction of the road.

The donation of the right of way without any reservation of the timber, or the uses to which it could be put, put the county in the same plight and condition as if it had acquired the right of way by deed or condemnation. The timber passed, in the absence of any restriction, and the county had the same right to permit the defendants to use the laps and tops for firewood in cooking and in drying the laborers as it would have had to use the timber for construction or repairing the roadway.

Affirmed.

S. W. FOWLE & SON v. J. B. HAM.

(Filed 11 September, 1918.)

1. Register of Deeds—Index—Registration—Deeds and Conveyances—Title—Purchasers for Value.

The indexing of deeds in the office of the register thereof is an essential part of the registration; and where the grantor's name has been omitted from the book, a subsequent grantee of the same lands from the same grantor acquires the title from him.

2. Statutes—Interpretation—Supreme Court Decisions—Property Rights—Overruled Decisions—Retroactive Effect.

Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect; and where a deed has not been properly indexed, but valid to pass title against a subsequent purchaser, under the decision of *Davis v. Whitaker*, rendered in 1894, and registered prior to *Ely v. Norman*, 175 N. C., 299, which overruled the former decision, the rights thus acquired will not be disturbed.

HOKE, J., concurring.

ACTION to restrain the cutting of timber and to recover damages, heard by *Connor, J.*, at May Term, 1918, of BEAUFORT.

The Court denied a restraining order, and plaintiffs appealed.

Ward & Grimes for plaintiffs.
E. A. Daniel for defendant.

BROWN, J. The admitted facts are, that plaintiffs bought the land in controversy from Weston, who owned it. The deed was duly recorded, but never cross-indexed—that is, the name of the grantor was entirely omitted from the index.

Weston afterwards conveyed 20 acres of the land to one Cox, whose deed was duly recorded and indexed. There was nothing to show in the

grantor index that Weston had ever conveyed the land to plaintiffs, and, so far as the record discloses, Cox, who conveyed the land to defendant, himself had no knowledge, when they purchased, of the existence of the deed from Weston to Fowle.

In *Ely v. Norman,* 175 N. C., 298, it is held by a majority of this Court that the indexing of deeds is an essential part of the registration, as much as the indexing of judgments is a part of the docketing.

We deemed it essential, for the reasons given in the concurring opinion, to render such decision and to overrule *Davis v. Whitaker,* 114 N. C., 279.

If that was the only point in the record, we would stop here.

But plaintiffs contend that their deed was recorded in 1913, and that the decision in *Davis v. Whitaker* was rendered in 1894 and had become a rule of property upon which they had a right to rely, and that, according to that decision, they were not required to index their deed, for, while indexing is a convenience, it was not regarded as a legal essential up to *Ely v. Norman.*

We think the point is well taken. It has long been held that, when solemn decisions have settled precise cases so as to have become a rule of property, and acted upon as such, they should be followed, and when overruled by a subsequent case, the latter should not be given a retroactive effect. This just and salutary principle has been clearly expressed by Lord Mansfield in *Wyndham v. Chetwood,* 1 Burrows, 419. The law is very clearly stated by the West Virginia Court, as follows:

"An overruled decision is regarded as not law, as never having been law, but the law as given in a later case is regarded as having been the law even at the date of the erroneous decision. To this rule there is one exception: that where there is a statute, and a decision giving it a certain construction, the latter decision does not retroact so as to invalidate such contract." *Falconer v. Simmons,* 51 W. Va., 177.

The subject is very fully discussed and all the authorities collected in the opinion of *Justice Walker* in *Hill v. R. R.,* 143 N. C., 579.

In this view the deed from Weston to Fowle must have priority. The plaintiffs are entitled to the injunction.

Error.

HOKE, J., concurring: I cannot assent to the position that the laws of North Carolina controlling the question either make or were intended to make the indexing an essential part of a valid registration. The cases in other States which so hold were on the interpretation of statutes having substantially different wording from ours, and I am of opinion that the case of *Davies v. Whitaker,* 114 N. C., 279, was well decided. True, the books in many of the counties have become so numerous that with-

out an index the value of our registration laws, as an assurance of title, has been greatly impaired; but if a change is desirable on that account, I think it should be made by the Legislature and not by the courts. In any aspect of the matter, however, I concur in the disposition made of the present cause, the plaintiffs having acquired their title while the case of *Davies v. Whitaker* was recognized as law.

The position applicable is correctly stated, I think, in *Mason v. Cotton Co.*, 148 N. C., 510, as follows:

"The general principle is, that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law. *Center School Township v. State ex rel.*, 150 Ind., 168; *Stockton, Trustee, v. Manufacturing Co.*, 22 N. J. Eq., 56; *Storrie v. Cortes and wife*, 90 Tex., 283. To this the courts have established the exception that where a constitutional or statute law has received a given construction by the courts of last resort, and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision," citing *Hill v. R. R.*, 143 N. C., 539; *Gelpcke v. City of Dubuque*, 68 U. S., 175; *City of Sedalia v. George A. Gold*, 91 Mo. App., 32, and *Falconer v. Simmons*, 51 W. Va., 172.

On the record, plaintiff's case comes clearly within the principle of this exception, and I concur in the ruling that they have a valid title to the land covered by their deed.

JOHN R. CLEMENTS, ADMR. OF CLINTON CLEMENTS, v. ELIZABETH CITY ELECTRIC LIGHT AND POWER COMPANY.

(Filed 11 September, 1918.)

Electricity — Negligence — Evidence — Master and Servant—Proper Appliances—Trials—Questions for Jury.

Where there is evidence tending to show that the plaintiff's intestate was killed by defendant's wires strung along the top of its poles, heavily charged with electricity; that his hand came in contact therewith as he was descending from his work; that it was customary, under the circumstances, for the employees to unstrap the belt holding them at the top of the pole before coming down, and rely on their hands and spurs while descending; that rubber gloves were in common use to insulate and protect them, and that the defendant had furnished the intestate with im-

proper or insufficient gloves, the proximate cause of the injury: *Held*, sufficient to take the case to the jury upon the question of the defendant's actionable negligence.

ACTION tried before *Whedbee, J.*, at June Term, 1918, of PASQUOTANK.

From judgment of nonsuit plaintiff appealed.

Ehringhaus & Small for plaintiff.

Leon T. Seawell, W. A. Worth, and Aydlett, Simpson & Sawyer for defendant.

BROWN, J. The plaintiff's intestate was killed while engaged as a lineman in removing a defective arm from one of the poles carrying heavily charged wires in defendant's system. He had been ordered to do the work by Lewis, defendant's manager. The evidence tends to prove that, after removing the "dead arm," the intestate undertook to descend, and as he passed through the wires his hands came in contact with a heavily charged wire of about 2,300 volts. He was then seen to throw back his head and hang for an instant, while fire flashed and sputtered from his hands, and then his body fell out, "just like you shot a bird."

There is evidence tending to prove that the use of the safety belt is to hold the lineman in position while doing his work, and that when he undertakes to descend he must unstrap the belt from around the pole and rely on his hands and spurs in descending. There is evidence that rubber gloves are in common use to insulate and protect the lineman while grasping highly charged wires.

There is evidence that the gloves worn by intestate were defective and made of inferior substitute, and were useless as an insulator, but whether or not the lineman knew of the character and condition of the gloves does not appear. It is disputed as to whether the defendant or the lineman furnished the gloves. This is a most material point upon the determination of the liability of defendant.

If the defendant did not furnish them, and the intestate used his own gloves, the defendant cannot be held responsible for their condition.

There is some evidence from which the jury may infer that the defendant furnished them, and that their condition was the proximate cause of the injury. We will not consider the question of contributory negligence, except to say that the evidence does not show a state of facts from which no other inference can be drawn, and therefore a nonsuit upon that ground cannot be allowed.

We are of opinion that the issues raised by the pleadings should be submitted to the jury under proper instructions. *Register v. Power Co.*, 165 N. C., 234; *White v. Power Co.*, 151 N. C., 356; *Mitchell v. Electric Co.*, 129 N. C., 166.

Reversed.

GEORGE A. TWIDDY, ADMR. OF STEPHEN MULLEN, v. PETER MULLEN ET ALS.

(Filed 11 September, 1918.)

1. Executors and Administrators—Limitation of Actions—Pleas—Fraud—Collusion.

The administrator, in failing to plead the statute of limitations in favor of the heirs at law, must act in perfectly good faith, free from coercion or undue influence, and upon full and diligent investigation as to the *bona fides* or validity of the debt presented to him; and if he has been guilty of such gross negligence as to indicate that he has utterly disregarded the rights of the heirs in favor of the creditor, it amounts to collusion and fraud in law, entitling the heirs to relief against the judgment obtained in consequence.

2. Same—Evidence—Trials—Questions for Jury.

Where an administrator, who is the choice of the judgment creditor, and the latter's brother is on his administration bond, fails to plead the statute of limitations on an old and out-of-date note of the intestate, and judgment has been obtained without pleadings filed on the day after the administrator was appointed, and suit had been brought on this note in the intestate's lifetime, with nothing to show its termination, it is sufficient evidence to set aside the judgment, in favor of the heirs at law, upon the ground of collusion, and fraud, between the administrator and the creditor.

3. Executors and Administrators—Limitation of Actions—Pleas.

The plea of the statute of limitations by an administrator is frequently a just plea to protect the decedent's estate from unjust demands, when time has destroyed the evidence.

SPECIAL PROCEEDING, tried before *Whedbee, J.*, at June Special Term, 1917, of PASQUOTANK, upon this issue:

1. Was the judgment of J. C. Small against George A. Twiddy, administrator of Stephen Mullen, rendered through fraud upon the part of the plaintiff, George A. Twiddy, administrator, or through collusion between the plaintiff and J. C. Small? Answer: No.

The court charged the jury: "If you believe the entire evidence in this case, you will answer the first issue 'No.'" Defendants excepted and appealed.

Ehringhaus & Small for plaintiffs.
Aydlett, Simpson & Sawyer for defendants.

BROWN, J. In the recent case of *McNair v. Cooper,* 174 N. C., 566, we said that "While the law invests an administrator with a certain discretion as to pleading the statute of limitations, it is required of him that he act in perfectly good faith, free from coercion, undue influence, or collusion; and where fraud and collusion are therein shown by and between him and a creditor of the estate, the heirs at law may set aside the judgment accordingly rendered and plead the statute in their own behalf." We think the learned judge erred in holding that there is no evidence of collusion.

The administrator, Twiddy, was sought out by the creditor and requested to qualify as administrator of the debtor, Stephen Mullen, and the brother of the creditor signed the administration bond. The action on the note was brought the day after the administrator qualified, and judgment rendered against the administrator establishing the debt, as no pleas were interposed. The administrator was not present, gave no notice whatever to the heirs at law, and evidently had no time to make any investigation as to the validity of the debt and whether paid or not. There is evidence that Stephen Mullen died two years ago, and that during his life Small brought suit against him on this note. There is no evidence that said plaintiff recovered a judgment. The note was given to plaintiff's father twenty years ago, and plaintiff took it as part of his estate. There are a few other facts and circumstances that it is unnecessary to recite, as they are not very important.

It is not necessary that the administrator be guilty of great moral turpitude. If he is guilty of such gross negligence as to indicate that he has utterly disregarded the just rights of the heirs in favor of the creditor, it amounts to collusion and fraud in law, and the heirs may obtain relief.

If the administrator fails to act in perfectly good faith and free from coercion or undue influence, the aggrieved heirs will be afforded relief. *Pate v. Oliver,* 104 N. C., 458; *Williams v. Maitland,* 36 N. C., 92.

It is the duty of an administrator to make a full and diligent investigation as to the *bona fides* and validity of each debt presented against the estate of the intestate. If he does so, and acts in perfect good faith, and honestly concludes that he ought not to plead the statute of limitations, his conclusion is final. If he fails in such duty, the heirs will be afforded relief.

The statute of limitations is not an ignominous plea. It is frequently a just plea, and is intended to protect estates from unjust demands when time has destroyed the evidence that would protect them.

There is evidence in this case tending to prove that the administrator failed in the duty the law imposed on him.

The issue should have been submitted to the determination of the jury under proper instructions.

New trial.

AYCOCK SUPPLY COMPANY v. D. M. WINDLEY, MELSON WINDLEY AND W. S. RIDDICK.

(Filed 11 September, 1918.)

1. Partnership—Negotiable Instruments—Seal—Limitation of Actions.

A promissory note, signed by one of a partnership, with a seal after his own name, in behalf of the firm, or as purchasing agent for the others, is a simple contract as to the other partners, though a contract under seal as to the one thus signing, and is barred as to the others by the three-year statute of limitations.

2. Same—Ratification—Knowledge.

In order for members of a partnership to subsequently ratify the action of one of them in giving the firm's note under seal, and repel the bar of the three-year statute of limitations, it is necessary to show that the acts relied on were with knowledge that the instrument was under seal.

3. Same—Evidence—Trials.

A note under seal is not necessary to secure a lien for agricultural advances; and where the evidence tends only to show a partnership for farming purposes, and that one of the partners gave the firm's note under seal, and the other farmed and applied the proceeds towards the payment of the note, it is not sufficient to show that the other partner acted with knowledge that the note was under seal, and repel the bar of the three-year statute of limitations as to him.

WALKER, J., dissenting; HOKE, J., concurring in dissenting opinion.

ACTION tried before *Bond, J.*, at February Term, 1918, of BEAUFORT, upon these issues:

1. Is the defendant W. S. Riddick indebted to plaintiff, and if so, in what amount? Answer: $252, with interest from November 1, 1910.

2. Is said defendant barred by statute of limitations, as alleged in the answer? Answer: No.

Judgment was rendered, by consent, against the defendants Daniel M. and Melson Windley.

After verdict the judge made the following order:

"The court, as a matter of law and not in the exercise of discretion, orders the verdict rendered in this case on the second issue set aside and

that case stand for trial as to said second issue. It does so because in its opinion it should have charged the jury that if they believed the evidence and found the facts to be as it tended to prove they should answer the second issue 'Yes.'"

To this plaintiff excepts and appeals.

Small, MacLean, Bragaw & Rodman for plaintiff.
John H. Tooly, Harry McMullan for defendants.

BROWN, J. The purpose of this action is to recover a personal judgment against defendant W. S. Riddick on a bond, under seal, reading as follows:

BELHAVEN, County of Beaufort, State of N. C.
$549.56. Date, 13 May, 1910.

On or before the 1st day of November, 1910, with interest from maturity, payable annually, I promise to pay to the order of C. P. Aycock Supply Company five hundred and forty-nine and 56-100 dollars, for value received, without offset, the homestead and all other exemptions are hereby waived as to the debt evidenced by this note.

Witness my hand and seal. D. M. WINDLEY, (SEAL)
Purchasing Agent for Self and W. S. Riddick and Melson Windley.

Witness: O. C. SWINDELL.

This bond was given for farm supplies and advances and was secured by an agricultural lien of same date upon a crop of cotton, corn and potatoes grown during year 1910 on a farm cultivated by the three defendants as partners. The agricultural lien also secured the sum of $215.88, balance due by the copartnership to plaintiff on advances for year 1909. The defendant Riddick pleads the three years statute of limitation. This action was commenced 7 December, 1915.

It is too well settled to admit of dispute that where a written instrument is executed on behalf of a copartnership, and an individual partner signs the firm's name and affixes a seal to it, the instrument is the simple contract of the firm, although it is the sealed covenant of the individual partner who executed it. An action is barred on such instrument after three years from the time the cause of action arose as to the copartnership and the members thereof, except as to the individual who executed the instrument and affixed the seal. *Burwell v. Linthicum,* 100 N. C., 147.

In *Fronebarger v. Henry,* 51 N. C., 548, *Judge Ruffin* declares the rule of the common law to be that one partner cannot bind another by deed by virtue of his authority as partner merely, and that such instru-

ment, under seal, becomes the deed of the executing party alone. The subject is fully and learnedly discussed by *Judge Battle* in *Fisher v. Pender,* 52 N. C., 483.

The learned counsel for plaintiff seeks to avoid the effect of this established principle by attempting to show the defendant Riddick ratified the act of Windley in executing a sealed instrument executed by a member of the firm, and when so adopted and ratified it becomes the bond of each member as well as of the one who executed it. *Day v. Lafferty,* 4 Ark., 450. Notes to *Bank v. Johnson,* 14 Ann. Cases, 549, where the cases are collected. But these authorities also hold that "a partner cannot be charged with the ratification of a sealed note where it does not appear that he knew he was ratifying a *sealed* note."

In view of these authorities we agree with the learned judge that there is no sufficient evidence of an adoption and ratification of the instrument as a covenant under seal.

It is true that Windley testified that "Riddick knew about the execution of the papers and why they were executed for the firm," but there is no evidence that Riddick saw the papers or knew that a bond under seal had been given. He knew that an agricultural lien had been executed upon the crops for supplies and fertilizer, but as such an instrument does not require a seal, and as ordinary promissory notes require no seal, he did not know either from the character of the papers or from Windley's statement that a sealed instrument that would bind him for ten years had been executed. Neither do we think the evidence of payments shows a ratification of a sealed instrument. The evidence is that Riddick operated the farm during 1910 and "received and applied the crops that were made." The answer of Riddick admits "that W. S. Riddick paid plaintiff the sum of $513.51 on or about 1 January, 1911." A part of that money, it seems, plaintiff applied to the debt of 1909 and the balance of the bond sued on.

This payment is no evidence of ratification, because it does not appear that Riddick knew that the instrument was under seal before he made it, and, further, because the payment was one Riddick was compelled to make. He was undoubtedly bound by the agricultural lien, and the law itself compelled the application of the crops to the discharge of such lien. It is an indictable offense to willfully refuse to so apply them and otherwise dispose of them.

It may appear on the next trial that Riddick knew of the character of the instrument and that he adopted and ratified it as a sealed instrument, but the evidence on the last trial was not sufficient to establish it.

The order granting a new trial on second issue is

Affirmed.

WALKER, J., dissenting: We think that there is at least some evidence that W. S. Riddick knew of the sealed instruments—the note and the lien—for there were two of them signed and sealed alike. D. M. Windley, Melson Windley, and W. S. Riddick were parties in the business. D. M. Windley bought the fertilizers in 1910 and executed the papers under a seal to his own name as agent for the firm and one of the members of it. He then "turned the farm over to Riddick," who superintended it after that time, and when he received it, D. M. Windley told him that he had executed *"these"* papers for the firm—the note and the lien. There were no other papers answering the description but those now in question. Riddick paid money on the note. He further testified, "Mr. Riddick *knew about the execution of these* papers by me and why they were executed for the firm." Riddick paid money to a large amount that year on the note, and it would be strange if he did not require the production of the note and lien so that the proper credit should be entered on them, or at least on the note. This is the usual and almost universal way of doing such business by prudent men.

C. P. Aycock also testified that Riddick knew of the execution of the papers at the time he made the payment. There is no contention, and cannot be, that the witnesses were referring to any other papers than the note and lien. Riddick testified that he did not know that Windley had bought the guano and executed the papers for it. He contradicted the other witnesses, but this conflict in testimony was for the jury, and not for the court to settle. The jury could well draw the inference from what Windley and Aycock had testified, that Riddick had seen the papers, or that their contents, including the seal, had been called to his attention. When we speak of one having knowledge of the existence of a thing we thereby impute to him knowledge also of its nature and characteristics or of its component parts.

If the witnesses had said that he knew that *a* note and lien had been given, there might be room to contend that it was not evidence as to knowledge of a seal, but those are not the words, and definite reference was made to these very papers that had the seals annexed to the name of Windley.

We have sustained verdicts on less evidence more than once. Direct evidence is not required, but the matter may be left to fair inference by the jury. It would be strange and unusual that a man should conduct important operations for months under written instruments and not ask to see them or not know their contents. It would be a very loose way to transact business and should not be inferred unless upon clear proof of the fact. Juries may take such matters into consideration and draw their conclusions therefrom in connection with other facts. His denial that he had been told of the papers at all, in the face of the testi-

mony of two credible witnesses, was not favorable to him. Even though evidence be slight, if a fair inference can be drawn from it of the existence of the fact to be proved, it should go to the jury. *S. v. Fanning,* 94 N. C., 940. It is not insufficient because it is weak. *S. v. Kiger,* 115 N. C., 746. And those were criminal cases. But this case is taken out of the realm of conjecture by the definite reference to *"these papers"*—that is, those in controversy. There can be no doubt that the defendant justly owes the debt. The jury so found, and there was no exception by him.

R. L. BELCH v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 11 September, 1918.)

1. **Master and Servant—Employer and Employee—Federal Employers' Liability Act—Statutes.**

   The Federal Employers' Liability Act, Fed. Stat., Anno., 1909 Supp., p. 584, regulating suits for physical injuries or death of employees of railroads while engaged as common carriers of interstate commerce, wrongfully caused by the negligence of the officers, agents or employees of such carriers, or by reason of negligence in their cars, engines, appliances, machinery, etc., so essentially modifies the common-law actions of negligence that all suits coming under its provisions are properly regarded as statutory and affords the controlling and exclusive rule of liability in suits of this character in instances in which it excludes liability, as well as those in which liability is imposed.

2. **Actions—Time for Commencement—Limitation of Actions.**

   Section 6 of the Federal Employers' Liability Act, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued, is not in strictness a statute of limitation affecting only the remedy, but is a statutory condition of liability affecting the claimant's right of action which must have been complied with in order that he may sustain it.

3. **Same—Nonsuit.**

   Revisal, sec. 370, allowing a new action to be brought within twelve months after nonsuit, is inoperative where the Federal Employers' Liability Act controls the subject-matter, and will not be allowed to affect section 6 of the Federal act requiring, without exception or modification, that actions coming within its provisions shall not be maintained thereunder unless commenced within two years from the day the cause of action accrued; and the State statute may not extend the time of commencing such action for a greater period of time than the Federal statute allows.

4. Master and Servant — Employer and Employee — Federal Employers' Liability Act — Repealing Acts — Conditions Precedent — Limitation of Actions.

The Federal Judiciary Acts of 1789, U. S. Rev. St., sec. 721, under which the State statutes have been the general rule of limitation as to common-law actions, cannot apply to the later Federal statute known as the Federal Employers' Liability Act, which provides, in effect, by section 6, for the causes therein embraced, action shall be commenced within two years from the day the cause thereof accrued; and this is true whether the restriction of two years be regarded as a statute of limitation or a condition of liability affecting the claimant's right.

ACTION under the Federal Employers' Liability Act, tried before *Devin, J.*, and a jury, at December Term, 1917, of NEW HANOVER.

The trial having been entered upon and the jury impaneled, it appeared from the averments in plaintiff's complaint as amended and the admissions on the argument that in August, 1913, plaintiff, an employee of the defendant, a railroad company engaged at the time as a common carrier of interstate commerce, received serious physical injuries attributable to the negligence of defendant's officers, agents, etc.; that soon thereafter and within two years of the occurrence, plaintiff instituted an action to recover for said injuries in the Superior Court of Robeson County, in said State, and same pended in said court till the trial was entered upon, and in said trial there was judgment of nonsuit against the plaintiff; that within one year from said nonsuit and more than two years of the occurrence, plaintiff instituted the present action to recover for same injury; and defendant having, among other things, plead the two years time in bar of recovery, on motion, the court entered judgment dismissing the action in form as follows:

"This cause having been called for trial, and the trial having been started, and the jury having been impaneled, and upon reading the pleadings the counsel for the defendant made a motion to dismiss the action, because, upon the complaint as amended, appeared that this action was not brought within two years, as required by the act of Congress; and the court being of the opinion that the action was not brought within two years, as required by the act of Congress, and that the local State statute allowing the plaintiff to bring a new action within one year after a nonsuit had no application, and that therefore the defendant's motion should be allowed:

"It is, therefore, on motion of the counsel for the defendant, ordered and adjudged that the plaintiff's action be and the same is hereby dismissed, and that the defendant go without day, without recovering any costs, as the suit is brought *in forma pauperis.*"

From this judgment plaintiff appealed.

E. K. Bryan and J. Felton Head for plaintiff.
John D. Bellamy & Son for defendant.

HOKE, J. The Federal Employers' Liability Act (Fed. Stat. Anno., 1909 Supp., p. 584) was designed and intended to regulate suits for physical injuries or death of employees of railroads while engaged as common carriers of interstate commerce, wrongfully caused by the negligence of the officers, agents, or employees of such carriers, or by reason of "negligence on their cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment"; and section 6 of said act provides, among other things, "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," etc.

In authoritative decisions construing the statute it is held that the same affords the controlling and exclusive rule of liability in suits of this character, and that this position is effective and "as comprehensive of those instances in which it excludes liability as of those in which liability is imposed." *Erie R. R. v. Winfield,* 244 U. S., 170; *N. Y. Central v. Winfield,* 244 U. S., 147; *St. Louis, etc., R. R. v. Hesterly, Admr.,* 228 U. S., 702; Second Employers' Liability Cases, 223 U. S., 1.

In *Erie R. R. v. Winfield, supra,* as reported in Anno. Cases, 1918, B, at p. 662, a very satisfactory *syllabus* of the decision appears in the first headnote, as follows:

"Congress intended the Employers' Liability Act of 22 April, 1908 (35 Stat. L., 65, c. 149; Fed. St. Ann., 1909 Supp., p. 584) regulating the liability of an interstate railway carrier in case of the injury or death of an employee when employed in interstate commerce, to be as comprehensive of those instances in which it excludes liability, *i. e.,* where there is no causal negligence for which the carrier is responsible, as of those in which liability is imposed, and in both classes such act is paramount to and exclusive of State regulation." And in *N. Y. Central R. R. v. Winfield,* Reporter's Edition, it is said:

"The liabilities and obligations of interstate railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated both exclusively and inclusively by the Federal Employers' Liability Act, and, having thus fully covered the subject, no room exists for State regulation, even in respect of injuries occurring without fault, as to which the Federal statute makes no provision."

The law in question contains such essential modifications of the common-law actions of negligence that all suits coming under its provisions should be properly regarded as statutory in character (*Union Pacific Ry. v. Wyler,* 158 U. S., 285, and *Morrison v. Baltimore & Ohio,* 140

App. Cas. Dis. Co., 139); and, this being true, the cases on the subject fully justify the interpretation that this period of two years, fixed upon by section 6, is not in strictness a statute of limitations affecting only the remedy, but is a statutory condition of liability affecting the claimant's right of action. And, as the correct deduction from this position, it has been expressly held that the provision very generally appearing in the State statute of limitations, to the effect that an action otherwise barred may be maintained if commenced within twelve months after nonsuit, has no application to cases coming under the Federal law; that the action required by this law to be brought within two years from the time the cause of action accrued means, by correct interpretation, the action in which recovery must be obtained, to wit, the last action; and the requirement holds, notwithstanding the time covered by any former suit for the same cause. *Vaught v. Va. & S. W. R. R.,* 132 Tenn., 679; *Shannon v. Boston & M. R. R.* (New Hampshire), 92 Att., 162.

Decisions that are in accord with approved text-books on the subject: Thornton on Employers' Liability, etc., Acts (3d Ed.), sec. 158; Ritchie on Employers' Liability, etc., Acts, secs. 101, 103, 104, and find general support in *The Harrisburg,* 119 U. S., 199; *U. S., etc., v. Boomer et al.,* 183 Fed., 726, and many other cases.

We are not aware that the Supreme Court of the United States has made decision on this question in direct reference to the statute we are now considering, but the general principle has been approved and applied in actions on insurance policies where there was a contractual limitation as to the time of commencing the action.

Thus, in *Riddlesbarger Insurance Co.,* 74 U. S., 387, where the policy stipulated that actions thereon should be brought within twelve months after loss, suit on the policy having been brought after that time and a State statute pleaded, allowing a second suit if brought within twelve months after nonsuit of a former action commenced within the time, recovery was denied, and *Associate Justice Field,* speaking to the question, said: "The action mentioned which must be commenced within the twelve months is the one which is prosecuted to judgment. The failure of the previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained unless such action shall be commenced within the period designated. It makes no provision for any exceptions in the event of failure of an action commenced, and the court cannot insert one without changing the contract." A ruling that, so far as examined, has been recognized and upheld in every State court where the question has been presented and these contract limitations are allowed. *Hocking v. Ins. Co.,* 130 Pa. St., 170; *Wilson v. Ins. Co.,* 97 Ga., 722; *Harrison v. Ins. Co.,* 102 Iowa, 112; *McFarland v. Ins. Co.,* 6 W. Va., 437; *Guthrie v. Indemnity Co.,* 101 Tenn., 643; *McElray v. Ins. Co.,* 48 Kansas, 200.

We are not inadvertent to several decisions of our own Court which hold that this provision (Rev., 370), allowing a new action to be brought within twelve months after nonsuit, applies to all cases of nonsuit, including actions for wrongfully causing the death of another, required by our statute to be brought within one year after the death (Rev., 59), and held with us to be a statutory condition of liability. *Gullidge v. R. R.*, 148 N. C., 567; *Meekins v. R. R.*, 131 N. C., 1.

But while this is the recognized position as to suits governed by the laws of this jurisdiction, it may not be allowed to prevail when a Federal statute conferring the right of action has fixed upon two years as the time within which the action should be brought, without any modification by reason of the pending of a former suit; and our highest Court, as stated, construing the law, has held that the statute itself affords the exclusive and controlling rule of liability in all cases coming under its provisions.

Even if the statutory restriction of two years should be regarded as a statute of limitations, it may not avail the plaintiff. Ever since the Federal Judiciary Act of 1789 (U. S. Rev. St., sec. 721), the State statute has been the general rule of limitations as to common-law actions in the Federal Court. *Bauserman v. Blunt*, 147 U. S., 647; *Junielle v. Billman Co.*, 229 Fed., 333. But no such rule can obtain when a later Federal statute governing the matter makes express provision to the contrary. *U. S. v. Boomer*, 183 Fed., *supra*.

In this case, as stated, the action, under and by virtue of such a statute, is required to be brought within two years from the time the cause of action accrued. There is in it no exception or modification of this limitation by reason of the pending of a former action, nor any provision extending the time for a stated period after nonsuit had; and, in any aspect of the case, we concur in his Honor's view, and are of opinion that the action has been properly dismissed.

Affirmed.

ELIZABETH CITY v. J. O. COMMANDER.

(Filed 11 September, 1918.)

1. **Municipal Corporations—Cities and Towns—Streets—Offer to Dedicate—Revocation—Acceptance—Deeds and Conveyances.**

Where the owner of lands within the corporate limits of a town has caused the same to be surveyed into streets and lots, and has duly registered the plat thereof, it is an offer of dedication, which is irrevocable after the acceptance by the town, or his conveying the lots accordingly before revocation.

2. Same—Maps.

A conveyance of land which the owner has platted into streets and lots, with map duly registered, made subject "to any vested or prescribed rights of the" town and others to a street designated therein, is not a revocation of the offer to dedicate.

3. Deeds and Conveyances—Boundaries—Description—Interpretation—Reference to Maps—Municipal Corporations—Cities and Towns—Streets—Offer of Dedications.

Where the owner of lands within the corporate limits of a town has caused the same to be platted into streets and lots, and the map thereof duly registered, and, in conveying a part thereof, includes one of the streets within the boundaries given, and states that the description is according to the recorded plat, giving book and page in the register of deeds' office, the effect of the reference to the plat is to incorporate it in the deed as a part of the description of the land conveyed; and, construing the instrument as a whole, it conveys all the land, including the street, subject to the easement therein for the public use, and does not affect the previous offer of dedication.

APPEAL by defendant from *Whedbee, J.*, at Special June Term, 1918, of PASQUOTANK.

This is an action to have what is known as Dyer Street, in Elizabeth City, declared a public street, and to prevent the defendant from obstructing the same.

The land covered by Dyer Street is a part of 17 acres of land formerly belonging to J. W. Hinton, and by successive conveyances the title to the whole 17 acres was vested in Bush & Lippincott in 1881.

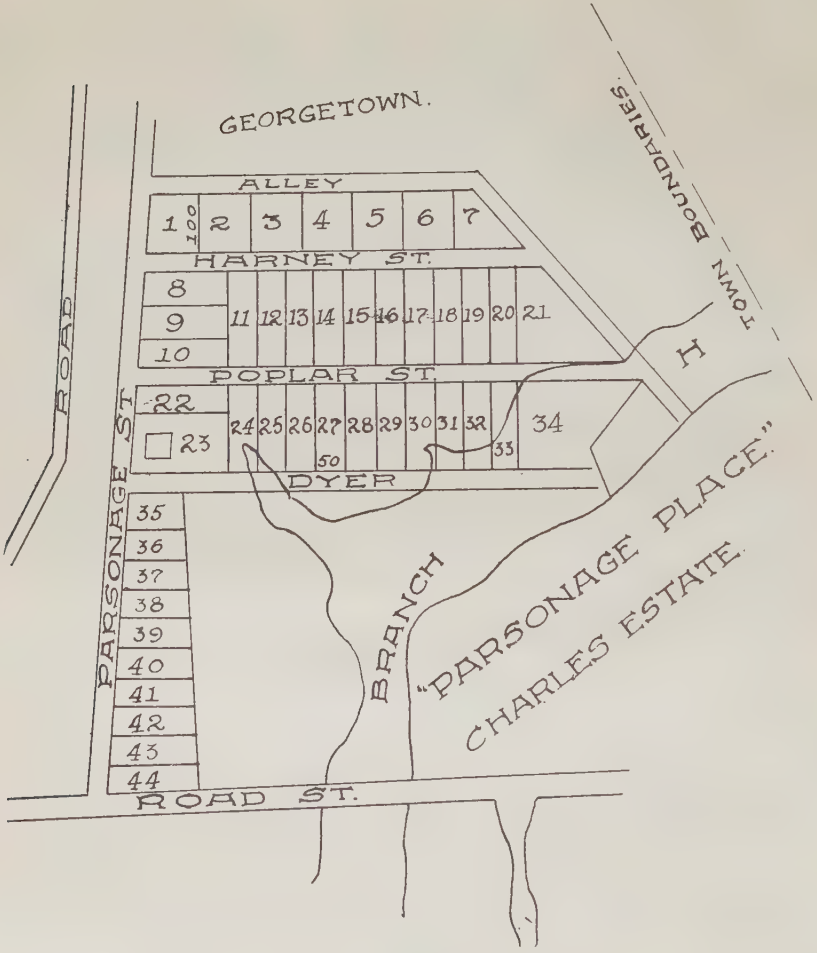
In July, 1881, Bush & Lippincott had the land surveyed and platted and subdivided into lots which were numbered, and streets which were named, including Dyer Street.

The plat of this survey was registered in Pasquotank County, in Book 4, pages 38 and 39, and is as follows:

On 11 September, 1882, W. H. Smith executed a deed to R. H. Berry, purporting to convey some of said lots, "subject to any vested or prescribed rights of the corporation of Elizabeth City and others to Dyer Street."

On 15 September, 1882, the surviving partners of Bush & Lippincott executed a deed to the said R. H. Berry, conveying several of the lots on the plat by the following description:

"Situate in the County of Pasquotank, State of North Carolina, in the town of Elizabeth City, known as 'Parsonage' property, bounded on the north or northeast by the remaining part of lot No. 30, 38 feet wide, *extending from Dyer to Poplar Street;* on the easterly side, by the Academy lot and Hinton lots; on the south, by Parsonage Street, or Cotter Street; on the westerly side, by Poplar Street. The description



herein made is according to a plat recorded in the office of the Register of Deeds of Pasquotank County, in Book 4, pages 38 and 39."

The defendant claims under this deed, and the boundaries named therein cover Dyer Street, the deed to the defendant himself being executed by N. W. Stevens on 9 December, 1907, and containing the following clause:

"This deed is made subject to any right the town may have to lay out Dyer Street as per the Conrow, Bush & Lippincott plat, as recorded in Book 4, pages 38 and 39."

After the execution of the deed to Berry, the survivors of Bush & Lippincott executed several deeds to different parties, conveying lots by numbers to different parties, and calling for the streets thereon, although none of these deeds called for Dyer Street.

The plaintiff relied on other deeds and contracts to show a dedication of Dyer Street to the use of the public prior to making and recording of the plat; but, in the view taken by the court of the question involved, it is not necessary to state the facts in regard thereto.

At the conclusion of the evidence his Honor instructed the jury to answer the issues in favor of the plaintiff if they believed the evidence, and the defendant excepted.

There was a verdict for the plaintiff, and from the judgment pronounced thereon the defendant appealed.

Aydlett, Simpson & Sawyer for plaintiff.
J. B. Leigh and Meekins & McMullan for defendant.

ALLEN, J. The defendant concedes that the survey and plat made by Bush & Lippincott, subdividing the land into lots and laying off streets thereon, including Dyer Street, was an offer to dedicate the street to the use of the public, and that if this offer had been accepted by the city, or if lots had been conveyed calling for the streets, before the revocation of the offer by Bush & Lippincott, the offer would then have been irrevocable; but he contends that there was no acceptance of offer and no deed calling for streets executed prior to the execution of the deed to Berry on 15 September, 1882, and that as this conveyed the street it was a revocation of the offer.

This position of the defendant is fully sustained by the authorities, if the deed to Berry is a revocation, but if not a revocation, the subsequent deeds by Bush & Lippincott calling for streets and referring to the plat are an irrevocable dedication, although Dyer Street was not referred to. *Conrad v. Land Co.*, 126 N. C., 776; *Collins v. Land Co.*, 128 N. C., 564; *Hughes v. Clark*, 134 N. C., 459; *Baillere v. Shingle Co.*, 150 N. C., 637; *Green v. Miller*, 161 N. C., 29; *Sexton v. Elizabeth City*, 169 N. C., 390; *Wheeler v. Construction Co.*, 170 N. C., 428.

The Court says, in *Conrad v. Land Co.*: "If the owner of land lays it off into squares, lots, and streets, with a view to form a town or city, or as a suburb to a town or city, certainly if he causes the same to be registered in the county where the land is situated, and sells any part of the lots or squares, and in the deed refers in the description thereof to the plat, such reference will constitute an irrevocable dedication to the public of the streets marked upon the plat. *Meier v. Portland*, 16 Oregon, 500. . . . It is immaterial whether the public authorities of

the city or county had formally accepted the dedication." And in *Collin v. Land Co.,* quoting from Elliott on Roads: "It is not only those who buy lands or lots abutting on a street or road laid out on a map or plat that have a right to insist upon the opening of a street or road, but where streets and roads are marked on a plat, and lots are bought and sold with reference to the map or plat, all who buy with reference to the general plan or scheme disclosed by the plat or map acquire a right to all the public ways designated thereon, and may enforce the dedication. The plan or scheme indicated on the map or plat is regarded as a unity, and it is presumed, as well it may be, that all the public ways add value to all the lots embraced in the general scheme or plan. Certainly, as every one knows, lots with convenient cross-streets are of more value than those without, and it is fair to presume that the original owner would not have donated land to public ways unless it gave value to the lots. So, too, it is just to presume that the purchasers paid the added value, and the donor ought not therefore to be permitted to take it from them by revoking part of his dedication."

Both of these cases are affirmed and approved in the other cases cited.

It becomes, therefore, of the first importance to determine the proper construction of the Berry deed, and to see whether it can be held to amount to a revocation.

The deed of 15 September was executed four days after the execution of the deed from Smith, purporting to convey lots marked on the plat, which clearly recognized the right of the city in Dyer Street, because it says that the conveyance is subject "to any vested or prescribed rights of the corporation of Elizabeth City and others as to Dyer Street."

The deed of 15 September contains no express terms of revocation, and on the contrary one of the boundaries in the deed is described as "extending from Dyer to Poplar Street."

It goes further than this, because, immediately following the enumeration of the boundaries, it is said in the deed: "The description herein made is according to a plat recorded in the office of the Register of Deeds of Pasquotank County, in Book 4, pages 38 and 39."

The legal effect of this last clause in the description is, according to the authorities, to incorporate the plat in the deed as a part of the description of the land conveyed. *Everett v. Thomas,* 23 N. C., 252; *Euliss v. McAdams,* 108 N. C., 511; *Hemphill v. Annis,* 19 N. C., 516; *Gudger v. White,* 141 N. C., 517; *Baillere v. Shingle Co.,* 150 N. C., 637.

The Court says, in *Everett v. Thomas:* "We do not doubt that, by a proper reference of one deed to another, the description of the latter may be considered as incorporated into the former, and both be read as one instrument for the purpose of identifying the thing intended to be conveyed." And in *Hemphill v. Annis:* "It has been well settled by a series

of adjudications that where a reference is made in one deed to another for a more definite description, the effect is to incorporate the description of the instrument referred to into that containing the reference, provided the language used points so clearly to the explanatory deed or instrument as to make it possible to identify it." And the other cases are to the same effect.

We have, then, in the deed to Berry two descriptions—one sufficient to convey the fee in the street, and the other conveying the land and imposing upon it the easement; and following the rule of construction announced in *Gudger v. White,* 141 N. C., 517, that the whole deed must be considered in determining the intent of the parties, and in *Modlin v. R. R.,* 145 N. C., 222, that effect must be given to all the clauses of the deed except when they are inconsistent and irreconcilable, the proper interpretation of the deed is that it conveyed the fee to all of the land, including Dyer Street, subject to the easement in Dyer Street for the use of the public; and if so, it cannot have the effect of revoking the offer to dedicate the street, arising upon the survey and plat made by Bush & Lippincott; and the execution of this deed and the subsequent deeds calling for lots and streets made this offer irrevocable.

We are therefore of opinion that, upon the facts that were not in dispute, his Honor held correctly that the plaintiff was entitled to the relief prayed for.

No error.

HEZEKIAH BROWN, BY HIS NEXT FRIEND, v. D. U. MARTIN.

(Filed 11 September, 1918.)

1. Malicious Prosecution—Criminal Law—Parties—Evidence.

Testimony that the recorder issued a warrant against the plaintiff in an action for malicious prosecution, in which the defendant was the prosecutor; that the defendant, as prosecutor therein, had employed an attorney to investigate the matter, who filled out and signed the warrant, and the defendant was present and testified at the trial of the criminal action, and paid fee of prosecuting attorney, is sufficient to connect the defendant with the criminal prosecution and make him liable in damages therefor.

2. Malicious Prosecution — Criminal Law — Compensatory and Exemplary Damages—Malice—Ill-will.

Legal malice, in causing the arrest, is necessary in an action to recover damages for malicious prosecution, and may be inferred by the jury from the want of probable cause as a basis for awarding compensatory damages; but to recover punitive damages, in the discretion of the jury, the plaintiff must further show that the criminal act was wrongfully instituted from actual malice in the sense of personal ill-will, or under circum-

stances of insult, rudeness, or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right.

3. Same—Evidence.

In an action to recover damages for malicious prosecution, evidence tending to show that the prosecutor in the criminal action took the defendant therein, about 16 years of age, aside, before the trial, charged him with stealing his money, offered to give him half if he would confess and surrender the remainder, in so threatening a manner that he "had to tell him something," is sufficient as tending to prove the personal ill-will necessary to sustain a recovery of punitive damages, and that the defendant was not moved by consideration of the public interest in instituting the criminal prosecution, but for the purpose of extorting money.

APPEAL by defendant from *Connor, J.*, at April Term, 1918, of BEAUFORT.

This is an action to recover damages for malicious prosecution, the charge against the plaintiff in the criminal prosecution being that he stole certain money, the property of the defendant in this action, or of the corporation of which the defendant was president.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, on the ground that there was no evidence connecting him with the criminal prosecution.

The motion was overruled, and the defendant excepted.

On the issue of damages his Honor, among other things, instructed the jury as follows:

"I instruct you that if you find that the conduct of the defendant in respect to this arrest and prosecution was reckless, wanton and malicious, that it was without regard to the rights of the plaintiff, then, gentlemen, it is within your discretion to include in your answer to the fourth issue a sum of money which you may deem proper as smart money, or as punitive damages. You are not required by the law, notwithstanding what your finding as to the facts may be, to include any punitive damages, but the whole matter, as to whether or not you shall include punitive damages, is left to your discretion, to your sound judgment, provided you shall find that the conduct of the defendant was reckless, wanton and malicious."

The defendant excepted to this part of the charge upon the ground that there was no sufficient evidence to justify submitting the question of punitive damages to the jury.

The jury returned the following verdict:

1. Did the defendant cause the arrest and prosecution of the plaintiff, as alleged? Answer: "Yes."

2. If so, was the arrest without probable cause? Answer: "Yes."

3. If so, was the arrest and prosecution malicious? Answer: "Yes."

4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: "$300."

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appealed.

Ward & Grimes for plaintiff.
John G. Tooly and Harry McMullan for defendant.

ALLEN, J. The evidence connecting the defendant with the criminal prosecution is ample. The recorder, W. H. Hooker, testified: "I issued a warrant for Hezekiah Brown, charging him with taking some money of Mr. D. U. Martin. Mr. Martin was the prosecutor in that warrant. Mr. Thompson was attorney for him"; and Mr. Thompson testified: "Mr. Martin told me to investigate the matter and see what was in it. I then went and talked to one Mr. Brown and Mr. Bonner and Mr. Harton. I asked Mr. Bonner to see his paper, and there was an affidavit and order of arrest by J. M. Messick. The affidavit wasn't signed or sworn to, and was signed by J. M. Messick, justice of the peace. I then went in my office and filled out a warrant and signed it myself and went before the recorder and swore to it, and then he issued an order of arrest, and I took it and gave it to Mr. Bonner. All Mr. Martin told me to do was to investigate it. He came up the next night and was present at the trial, and I put him on the stand and he testified. He paid me for my services in the matter."

The second question presents more difficulty, as the plaintiff testified that the relationship between him and the defendant had been friendly, but we cannot say there was no evidence to support the charge on punitive damages.

The rule is established in *Stanford v. Grocery Co.*, 143 N. C., 419, that legal malice, which must be present to support an action for malicious prosecution, may be inferred by the jury from the want of probable cause, and that it is sufficient as a basis for the recovery of compensatory damages, but that when punitive damages are claimed, the plaintiff must go further and offer evidence tending to prove that the wrongful act of instituting the prosecution "was done from actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right."

The evidence of the plaintiff tends to prove that he was about seventeen years of age at the time of the trial and not more than sixteen years of age when he was prosecuted before the recorder; that before the trial the defendant took him off by himself, charged him with stealing the money, and told him he would give him half the money if he would

confess and surrender the remainder, and the plaintiff says "he acted like he was going to kill me, and I had to tell him something."

This is some evidence, although, when all of the circumstances are considered, not very strong, tending to prove personal ill-will, and it also permits the inference that the defendant was not moved by considerations of the public interest in instituting the criminal prosecution, but that it was done for the purpose of extorting money from the plaintiff.

We therefore conclude that there was no error committed upon the trial of the action.

No error.

MRS. ZULA JONES v. O. C. SWINDELL.

(Filed 11 September, 1918.)

1. Easements—Pathways—Adverse Possession—User.

In order for the owner of lands to acquire the right to use a passway over the lands of another to his own premises, the user must not only be under a claim of right for twenty years, but it must be open and with the intent to claim against the true owner, and not permissive.

2. Same—Deeds and Conveyances—Reverter—Permissive User.

Where lands granted for church purposes, under certain conditions, with a path leading thereto, laid out by the grantor, since deceased, have reverted to the grantor under the provisions of the conveyance, and has been partitioned among his heirs at law, the one acquiring the land on which the church was situated does not acquire a right to the pathway by adverse user, for the pathway, having been opened for the benefit of those attending church, the natural right to its use, nothing else appearing, ceases upon the discontinuance of the church.

3. Same—Evidence.

Where an heir at law of a deceased grantor claims the right, by adverse user, to a passway over lands of others, which has been divided in proceedings for partition, testimony that the parties had run a fence across the path before the proceedings were instituted is some evidence that the use was permissive and not adverse.

APPEAL by plaintiff from *Bond, J.*, at February Term, 1918, of BEAUFORT.

This is an action to have the rights of the plaintiff declared in a certain passway leading from Maple Street, in Pantego, across a lot on which the plaintiff now lives, and on which the Freewill Baptist Church was formerly situate, and to prevent the defendant from obstructing the same.

In 1882 Ephraim S. Radcliffe, who was then the owner of a tract of

land, a part of which was within the boundaries of the town of Pantego, conveyed a part thereof to the Freewill Baptist Church and laid out a passway from Maple Street to the church.

The deed provided for a reverter to the grantor, Radcliffe, or his heirs, upon certain conditions named in the deed, and under these conditions the land and the church reverted to the grantor, and he died seized thereof.

After his death the land was divided between his heirs at law, of whom the plaintiff was one, and lot No. 2 was allotted to the plaintiff. The church stood on this lot, and the plaintiff converted it into a residence, and is now living in it.

The plaintiff claimed an adverse user of the passway for more than twenty years.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

ALLEN, J. We are of opinion, on an inspection of the whole record, that there is no sufficient evidence of an adverse possession of the passway by the plaintiff or by the public to confer any rights on the plaintiff, and that the evidence does not show that the passway was open and existing at the time of the partition proceeding, so as to entitle the plaintiff to invoke the principle that the several parcels of land allotted in a partition proceeding are subject to the benefits and burdens of an existing passway, although there may be no reference to the passway in the partition proceedings.

It was held in *Snowden v. Bell,* 159 N. C., 499, following earlier decisions, that a mere user for twenty years was not sufficient to confer the right to a passway, and that to have this effect the user must not only be under a claim of right, but it must be open and with an intent to claim against the true owner and not permissive.

In this case all of the evidence tends to prove that the passway was open for the benefit of those attending the church, and naturally the right to its use, nothing else appearing, would cease when the church was discontinued, and it appears from the plaintiff's evidence that, in recognition of this fact, the plaintiff and her mother had closed the passway, and that there were fences across it at the time of the partition proceeding.

The plaintiff contended, among other things, that Radcliffe "opened this way, leading from the street to the church, through his land for general public use. He allowed the members of the church to go through

his land." "I don't remember for just how long the church was used. I think it was about 1906 or 1907 that they abandoned this church and it came back. Mother took possession of the church building, but didn't do anything with it until it was divided and given to me, and I lived there with my mother. She built a fence across this way that I am talking about just for a short time. She built a fence across the way that I am talking about. That fence crossed the way near the church and down near the church, too, at a time when she and I owned all of the land when it was undivided. At the time that division was made, this way that I am talking about had a rail fence across it. The rails just put Mr. Ricks' fence and mother's together, and the street was maintained just as it was. At the time of this division in 1913 the way was closed up by a fence across each end of it, and the fence was put there by my mother and joined Mr. Ricks' fence."

This evidence clearly shows that the passway was opened for the benefit of the church, and that the user of it by those attending the church was permissive and not adverse, and that after the church was discontinued and there was a reverter to Radcliffe, that his heirs at law exercised their right to close it, and that it was closed at the time of the partition proceeding, and, if so, the plaintiff has no right which she could enforce in this action.

Affirmed.

LILLIE MAY CARTWRIGHT v. NORFOLK SOUTHERN RAILROAD COMPANY AND THE PULLMAN CAR COMPANY.

(Filed 11 September, 1918.)

1. Witnesses — Adverse Parties — Commission — Statute — Pleadings—Evidence—Supporting Affidavit—Waiver.

Where an adverse party, sought to be examined before a commissioner as a witness, before pleadings filed, excepts to the proceedings for the lack of a supporting affidavit, the exception should be sustained; but the irregularity may be waived by his not excepting to an order made at the next term of the court, requiring him to answer and taking advantage of a further and invalid provision therein.

2. Same—Rights of Parties—Presence—Examination.

Where the court has entered an order that an adverse party answer questions he had refused to answer before a commissioner appointed under the provisions of the Revisal, sec. 856, a further provision that the party would be deemed to have complied if he thereafter filed answer under oath, deprives the examining party of his right to be present for cross-examination, etc., and is contrary to the provisions of Revisal, sec. 865, requiring that such examination must be in the same manner and subject to the same rules as applicable to other witnesses, etc.

3. Appeal and Error — Witnesses — Evidence — Commission—Adverse Parties—Examination—Statutes.

An appeal will directly lie from an order of the Superior Court, duly excepted to, denying to a party his right to be present at the examination of his adversary before a commissioner appointed for the purpose, under the provisions of Revisal, secs. 865, 866.

APPEAL by defendants from *Bond, J.*, 16 February, 1918; from PASQUOTANK.

This is an appeal from an order for the examination of the plaintiff.

On 11 November, 1916, the plaintiff had a summons issued against the Norfolk Southern Railroad Company and the Pullman Company.

On 24 September, 1917, she filed her complaint, in which she alleges that "*on or about* 31 October, 1916," she purchased a ticket at Norfolk for Elizabeth City; that as she got upon the platform of defendant's train she was informed "by the conductor *or some other* uniformed officer of the train" that there was no room in the regular coach, and that she would have to go in the Pullman, of which class of cars there were two, and, upon attempting to do this, was met at the door by the Pullman conductor and refused admission; that the manner of the Pullman conductor was wanton, rude, boisterous, and insulting, and was spoken in the presence of a number of ladies and gentlemen who were on the car, to her great damage, in the sum of $3,000; that after leaving the Pullman she was directed to a seat in the day coach that had been provided, which coach was in a filthy condition, and that the defendant allowed a large crowd of drinking men to get in said car, and several of its occupants to indulge in drinking, carousing, and boisterous conduct, to her great suffering, to the amount of $3,000.

On 12 November the defendant, Norfolk Southern Railroad, caused to be served on the plaintiff a notice, that in accordance with chapter 12, subchapter 45, of the Revisal of 1905, it would examine her, upon oath, on Monday, 19 November, at 10:30 o'clock, before William Boettcher, commissioner, in his office in Elizabeth City. A commission to said Boettcher was regularly issued and subpœna regularly served upon said plaintiff.

On 19 November the plaintiff, pursuant to said notice and subpœna, appeared, and, objecting to the taking of her testimony, upon the advice of her counsel, declined to answer any and all questions, except one or two preliminary ones asked her by defendant's counsel.

On 24 January the defendants gave notice to plaintiff that on Monday, 11 February, 1918 (it being the first day of February Term of Pasquotank Superior Court), they would move before Hon. W. M. Bond, judge, for an order striking out of the record the complaint filed by her.

The motion was heard by said judge, all parties being present, and he entered the order, the material parts of which are:

"It is adjudged by the court that the matter be and it is hereby remanded to the commissioner, William Boettcher, acting under the commission heretofore issued to him by the clerk of this court, to the end that he may at once notify counsel for both sides and the plaintiff, naming a time and place when and where the examination will be further proceeded with, and the said plaintiff is directed to appear at said time and place and answer, as far as she is able to do, such questions as shall be asked her by defendant's counsel.

"A delivery to the counsel for the defendants of answers written by the plaintiff to the questions which were asked her on the prior examination, accompanied by an affidavit from her that they are true and correct and signed by her, shall be a compliance with this order."

There was no exception by plaintiff to this order, and in recognition of its validity she claims to have complied with it by filing with defendant's counsel her answers to the questions which were propounded to her at the hearing on 19 November.

The defendants, however, excepted to the order, and, while agreeing that the court below may have had the right to remand the matter to the commissioner to take plaintiff's examination, contend that it was beyond the power of the court to make that provision in the order which reads as follows:

"A delivery to the counsel for the defendants of answers written by the plaintiff to the questions which were asked her on the prior examination, accompanied by an affidavit from her that they are true and correct and signed by her, shall be a compliance with this order."

Ehringhaus & Small for plaintiff.
C. E. Thompson for Norfolk Southern Railroad.
James H. Pou for Pullman Company.

ALLEN, J. The order of *Judge Bond* requires the plaintiff to appear before the commissioner for examination, and to answer, as far as able, all such questions as shall be asked by the defendant's counsel; and as the plaintiff does not appeal from this order, she is precluded from raising an objection to its regularity because made before issue joined and without a supporting affidavit; and the only question presented for decision is as to the correctness of the ruling that the delivery to counsel for the defendants of written answers to the questions asked before the commissioner shall be a compliance with the order requiring her to submit to an examination, which ruling is, in our opinion, erroneous.

The Revisal (sec. 865) provides that a party to an action may be examined as a witness at the instance of the adverse party, and "may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial or conditionally, or upon commission"; and the succeeding section authorizes this examination "at any time before the trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court."

These two statutes confer the right to examine the adverse party, in proper cases, "in the same manner and subject to the same rules of examination as any other witness"; and as one has the right to be present when he examines his witness, the same right exists when a party is examined either at the trial or before a commissioner.

It may be that no information will be gained on further examination that is not contained in the answers to the questions filed since the order was made, but we cannot say this is true.

The defendant's counsel might well have desisted from prolonging their examination before the commissioner until the right was declared, in face of the refusal of the plaintiff to answer any question, or the responses to the questions might suggest other lines of investigation.

In any event, the defendant has the right, under the statute, to examine the plaintiff before the trial as any other witness, and this right has been denied.

Appeals from orders, denying the right to examine a party, were entertained in *Bailey v. Matthews,* 156 N. C., 81, and in *Fields v. Coleman,* 160 N. C., 11, and this order comes well within the principle of these cases, since, while admitting the right to an examination, a provision is inserted in the order which enables the plaintiff to avoid its effect.

The order will be modified by striking out the objectionable feature, and as modified it is affirmed. Let the costs of the Supreme Court be taxed against the plaintiff and bond.

Modified and affirmed.

R. C. BARCLIFF v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 September, 1918.)

Damages—Subsequent Injury—Waters—Railroads—Judgments—Estoppel.

Where damages—past, present, and prospective—have been recovered by a plaintiff of a defendant railroad company for negligently diverting surface water and ponding it upon his lands, an easement is acquired by the defendant to continue the particular injury for which it has paid, and the plaintiff may not thereafter recover, in a separate action, for the same

cause; and where he has alleged an additional and subsequent negligent act in his second action, and the issue as to this has been answered against him, he is concluded by the former judgment.

ACTION tried before *Bond, J.*, and a jury, at February Term, 1918, of PASQUOTANK.

This case was here before, and was reported in 168 N. C., 268. The action was brought to recover damages for injuries caused by diverting surface water and ponding it on plaintiff's land. The former action was for the same cause, the only difference between the two being the allegation in this action that, since the former verdict and judgment for permanent damages, at November Term, 1914, the defendant, in the year 1915, widened and deepened the ditch or drain flowing through its culvert, and thereby caused additional damage to the plaintiff's land and crops, but this allegation the jury found was not true. The verdict was as follows:

1. Is plaintiff the owner of the land described in the complaint? Answer: Yes.

2. Has the defendant wrongfully diverted and discharged the water on the lands of the plaintiff, as alleged, by deepening or widening ditch referred to? Answer: No.

The other four issues related to the damages, and were not answered, as the second issue had been decided against the plaintiff. Judgment was entered on the verdict, and plaintiff appealed.

T. J. Markham and Aydlett, Simpson & Sawyer for plaintiff.
C. E. Thompson for defendant.

WALKER, J., after stating the case: The verdict of the jury shows that there has been no change in the facts since the former judgment was rendered—that is, no additional cause of damage. Assuming that this is not a case in which permanent damages could be assessed without the consent of the plaintiff, it appears that in the first case he deliberately amended his complaint for the purpose of having such damages assessed, and he having thus made his election, which was entirely voluntary, and the case having been tried on that theory, and a judgment for permanent damages—that is, all damages, past, present, and prospective—having been recovered, he will not now be heard to say that it was all wrong, and that, while he has received the full amount of damages assessed by the jury upon the basis chosen by himself, he should not be bound by his act. This would not do, as it would be manifestly unjust, and contrary to all principles by which we judge the conduct of men. He cannot accept the benefit of his selection and at the same time repudiate the consequences.

This Court held in *Barcliff v. R. R.*, 168 N. C., 268, that permanent damages were recoverable, which was approved later in *Barcliff v. R. R.*, 175 N. C., 114, citing Revisal, sec. 394 (2); *Ridley v. R. R.*, 118 N. C., 996; *Stack v. R. R.*, 139 N. C., 366; *Beasley v. R. R.*, 147 N. C., 362; *Porter v. R. R.*, 148 N. C., 563; *Duvall v. R. R.*, 161 N. C., 448; *Perry v. R. R.*, 171 N. C., 38. The jury, in this case, have found as a fact that the ditch or drain has not been changed in any respect that would cause additional damage. It is of the same dimensions now as then, and for any injury resulting from the fill and drain, in its condition at that time, the plaintiff has in the assessment of the jury received his actual damages for all time, and he cannot be permitted to recover any part of it again. No man should be twice vexed for the same cause. The plaintiff may carve out as much as the law allows him in the first instance, but he will not be permitted to cut more than once. *Eller v. R. R.*, 140 N. C., 140; *S. v. Hankins*, 136 N. C., 621. Even where the rule, or the statute, as to permanent damages [Revisal, sec. 394 (2)], does not, perhaps, apply, this Court said, in *Brown v. Chemical Co.*, 165 N. C., 421: "While the plaintiff may not have been permitted in this instance to sue for permanent damages as a matter of right, the parties have the undoubted privilege of determining the case on that theory, if they so elect. It is one usually sought by defendant in order to protect himself from the cost and harassments of repeated suits and to acquire the right of conducting his business by designated methods; and where both parties have elected to have their rights determined on such an issue, it is not open to them, in the discretion of either, to change front and insist on a different method." *Webb v. Chemical Co.*, 170 N. C., 665; Woods Mayne on Damages, sec. 110. But the parties had the right to the assessment of permanent damages in the former suit. *Beach v. R. R.*, 120 N. C., 498; *Hocutt v. R. R.*, 124 N. C., 214; *Lassiter v. R. R.*, 126 N. C., 509; *Geer v. Water Co.*, 127 N. C., 349; *Caveness v. R. R.*, 172 N. C., 305. Such an assessment confers an easement, as in the case of condemnation, to continue the particular injury for which the damages were recovered and paid by the defendant. *Ridley v. R. R.*, 118 N. C., 996; *Rhodes v. Durham*, 165 N. C., 679; *Brown v. Power Co.*, 140 N. C., 333; *Webb v. Chemical Co.*, 170 N. C., 665; *Porter v. R. R.*, 148 N. C., 563. So it was held in *Murphy v. Matthews*, 40 Pa. Sup. Ct., 286: "Where a landowner brings suit against another to recover damages for the diversion of the water of a stream, and recovers a judgment based upon evidence of the difference in value of the land before and after the trespass, and the judgment has been paid, such landowner cannot maintain an action several years afterwards against the same defendant to recover damages for a continued diversion of the water of the same stream."

"A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having substantially the same object in view, although the form of the latter and the precise relief sought is different from the former." *Lumber Co. v. Lumber Co.,* 140 N. C., 442; *Edwards v. Baker,* 99 N. C., 258; *Tuttle v. Harrill,* 85 N. C., 456.

These are but statements, in one or the other form, of the general proposition that a plaintiff cannot recover twice for the same thing, or, in other words, he cannot have two compensations for the same complete tort, but must abide the first recovery as a full satisfaction for the wrong, and especially is this true when he has solemnly agreed, upon his own initiative, as here, to accept such a payment in final settlement.

Nor can plaintiff now be permitted to allege that the former recovery was upon a wrong basis; for if there was any error to his prejudice in the trial of that case, he should then have excepted and had it corrected by an appeal, and it is now too late to raise the question, as the judgment forecloses all these questions and estops him. The cases of *Duval v. R. R.,* 161 N. C., 448; *Perry v. R. R.,* 171 N. C., 38, and like decisions, are not applicable to the facts appearing in this record, except as to the right to recover permanent damages. There is no allegation or finding that brings this case within the operation of the principles decided there. The real point is, that the plaintiff has obtained a judgment, which covered all future damages, as well as those which were past and present; and as the jury were allowed, by his election and consent, even if not by the law, to include all prospective damages flowing from the same wrong, it must be conclusively presumed as against him that plaintiff has already received what he is now seeking to recover again. He has had a fair chance to show new damages, but failed to do so, as the jury have said that there has been no alterations in the circumstances. The discussion may well be closed with what a learned text-writer has said upon this question: "A plaintiff must recover in one action all he is entitled to; if dissatisfied with the result, he cannot bring a new suit to recover something more on the same cause of action." 23 Cyc., 1171, and cases cited in note 72, especially *Hodge v. Shaw,* 85 Iowa, 137, where it is said by the Court: "The same evidence which would establish his right of recovery in this action would also have established his claim in the former case; and the most infallible test as to whether a former judgment is a bar is to inquire whether the same evidence will maintain both the present and the former action," citing *Hahn v. Miller,* 68 Iowa, 748, and other cases. . . . "Whenever the nuisance is of such character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, then the damage is an original damage, and may be at once fully

compensated. *Town of Troy v. R. R.*, 3 Frost (N. H.), 83; *Powers v. City of Council Bluffs*, 45 Iowa, 652, and cases cited. The reason of the rule is, that the cause of damage is permanent in character; that, unless interfered with by the hand of man, it will continue indefinitely; and hence, damages, whether past or prospective, can be estimated, and in such cases successive actions cannot be brought."

We have confined the discussions to the question stated and considered in the plaintiff's brief, but upon a full review of the entire record we find no error therein. The charge was fair, full, and correct, and there is nothing of which the plaintiff can justly complain.

No error.

W. A. BISSETT ET ALS. v. C. W. BAILEY.

(Filed 11 September, 1918.)

1. **Evidence — Mental Capacity — Parties — Transactions and Communications—Deceased Persons—Deeds and Conveyances—Appeal and Error.**

In an action to set aside a deed for want of sufficient mental capacity of the grantor, since deceased, to execute it, testimony of witnesses, who are parties to the action, as to their opinion of the mental capacity of the grantor and his physical condition thereto relating, is not such transaction or communication with a deceased person as is prohibited by Revisal, sec. 1631, and its rejection by the trial court constitutes reversible error. *Semble*, declarations of the deceased, when tending to show the basis of the opinion, are also competent, when confined to the question of mental incapacity.

2. **Same—Drugs—Morphine.**

Where, in an action to set aside a deed for mental incapacity of the grantor, there is evidence that she was old and sick at the time, and under the care of her physician, and the physician has testified, as a medical expert, that the administration of morphine for a long time would deteriorate the body and mind, testimony of a party to the action that morphine tablets were given the grantor continuously and freely at this time, whenever she was suffering, is some evidence tending to show a weakened state of the grantor's mind, under the circumstances, and improperly excluded.

ACTION tried before *Kerr, J.*, and a jury, at April Term, 1918, of NASH.

The action was brought to set aside a deed alleged to have been executed by Mrs. Nancy Bailey to her son, C. W. Bailey, who is the defendant, on 12 August, 1914. Mrs. Bailey was about 70 years old when she died, 30 August, 1914. She was feeble for some time before her death, and had two falls—one which broke her arm, and the other her leg or

hip, the latter seeming to have caused or hastened her death. There was testimony offered by the plaintiff of her bad mental and physical condition, and of her want of sufficient mental capacity to execute the deed, which was admitted by the court, but certain other testimony of a like kind was excluded. If it was competent and relevant, its exclusion, of course, was error, and the question is, therefore, whether it was admissible. The following, which is taken from the record, will show the nature of the proof which was tendered by the plaintiff, and the rulings of the court thereon:

Mrs. Hattie Hathaway, witness for the plaintiffs, was asked this question by them: "What, in your opinion, was the mental and physical condition of Mrs. Nancy Bailey after she was hurt the last time?" Defendant objected. Objection sustained, and plaintiffs excepted.

The witness, if permitted to answer the question, would have testified that her grandmother was very feeble; that she was confined to her bed the entire time after having the last fall, and that her mind was very feeble and at times wandered.

C. A. Morgan, witness for plaintiffs, was asked this question by them: "What, in your opinion, was the physical and mental condition of the deceased, Nancy Bailey, at the several times you were there, between 30 July and the first of September?" Defendant objected. Objection sustained, and plaintiffs excepted.

The witness, if allowed to testify, would have stated that her physical condition was very bad; that she was confined to her bed all the time after the second accident, up to her death; that she suffered a great deal and was unable to move in any position in the bed; that she was old and had been feeble before this time, and that this second injury had made her much weaker and more feeble; that her mental condition was also bad, and that a portion of the time she was unconscious.

The following question was asked the witness by the plaintiffs: "What, in your opinion, was her mental condition during this time—that is, did she, in your opinion, have mental capacity to execute a deed—that is, to know what act she was doing and to comprehend the same?" Defendant objected. Objection sustained, and plaintiffs excepted.

If allowed to answer the question, the witness would have said that, in his opinion, after the second injury, Mrs. Bailey was not mentally capable of executing a deed; that she did not have the mental capacity to understand her act or to know what she was doing.

Mrs. Willie Bissett, witness for the plaintiffs, was asked this question by them: "State if morphine tablets were given to your mother during her last illness." Defendant objected. Objection sustained, and plaintiffs excepted.

If permitted to answer the question, the witness would have stated that these tablets were given continuously and frequently to her mother, whenever she was apparently suffering; that more than one box of tablets were given her.

The witness was asked the following question: "State whether or not, from your observation on the 12th day of August, 1914, your mother had the mental capacity to understand the nature of the execution of a deed, its scope and effect, or its nature and its consequences, and if she had the mental capacity to know what she was doing and to contract understandingly." Defendant objected. Objection sustained, and plaintiffs excepted.

If permitted to answer, the witness would have said that, in her opinion, the deceased did not have that capacity.

It appeared that Mrs. Bailey had fallen twice before the date of the deed.

Dr. Dickinson had testified, as a medical expert, that the administration of morphine to a patient for a long time would deteriorate the body and mind in every way, and that the doctors were compelled to use the drug and chloroform in her case to relieve the pain and to keep her quiet, and to prescribe the use of it for that purpose. The plaintiff proposed to show by a witness that morphine had been given to Mrs. Bailey during her sickness, about the time the deed was executed. The question put to the witness was: "State if morphine tablets were given to your mother during her last illness." Defendant objected. Objection sustained, and plaintiffs excepted. If permitted to answer the question, the witness would have stated that these tablets were given continuously and frequently to her mother, whenever she was apparently suffering; that more than one box of tablets were given her.

There was a verdict for the defendant and a judgment thereon. Plaintiffs excepted and appealed.

O. P. Dickinson and Manning & Kitchin for plaintiffs.
J. Crawford Biggs for defendant.

WALKER, J., after stating the case: The testimony offered by the plaintiffs as to the mental capacity of Mrs. Bailey, the grantor in the deed, was competent and material, and it was error to exclude it.

We were informed at the hearing that the ruling was based on the ground that the proposed evidence involved the stating of a transaction or communication between the witnesses, who were parties to the action, and the deceased, but we do not think it does have that effect, in the true sense of the law, which generally excludes such transactions and communications. We recently said, in the case of *In re Chrisman's Will,*

175 N. C., 420: "This Court has held in *McLeary v. Norment,* 84 N. C., 235, and more recently in *Rakestraw v. Pratt,* 160 N. C., 437, that in an action to set aside a deed or will on the ground of mental incapacity of the maker or testator at the time of their execution, it is competent for a witness, after testifying as to his opinion that the maker or testator was mentally incompetent at the time of the execution of the deed or will, to further testify as to such communications or conversations he had had with him upon which his opinion was founded; and as to such the provisions of Revisal, sec. 1631, prohibiting evidence of transactions with a deceased person, do not apply."

It was held, though, in that case, that the rule did not apply when the validity of the will was assailed for undue influence, when the question involved a transaction or communication with the deceased (175 N. C., 422), citing *Hathaway v. Hathaway,* 91 N. C., 139; *Lineberger v. Lineberger,* 143 N. C., 229, and *Bunn v. Todd,* 107 N. C., 266. But this is not very material here, as the rejected evidence related only to the mental condition of the testatrix. This Court held many years ago that such proof was not within the inhibition of C. C. P., sec. 343 (Battle's Revisal, sec. 343; Code, sec. 590; Revisal of 1905, sec. 1, 1631). It was there said (*McLeary v. Norment,* 84 N. C., 235, at 238): "The conversation offered was not to prove any fact stated or implied, but the mental condition of the plaintiff, as declarations are received to show the presence of disease in the physical system. How, except through observation of the acts and utterances of a person, can you arrive at a knowledge of his health of body and mind? As sanity is ascertained from sensible and sane acts and expressions, so may and must conclusions of unsoundness be reached by the same means and the same evidence. The declarations are not received to show the truth of the things declared, but as evidence of a disordered intellect, of which they are the outward manifestations. The admissibility of the witness' opinion, resting, as it necessarily must, upon past opportunities of observing one's conduct, requires, in order to a correct estimate of the value of the opinion, an inquiry into the facts and circumstances from which it has been formed. There seems to be no sufficient reason for receiving the opinion and excluding proof of the facts upon which it is founded." It was upon the ruling in that case that this Court has rested all of its decisions on this question. It was there further said by the Court, following *McCanless v. Reynolds,* 74 N. C., 301, that the principle upon which is based the exclusion of such transactions and communications as are described in Revisal, sec. 1631, is that, unless both parties can be heard, it is best to hear neither, because it is not only unfair and unjust to do so, but it would afford an easy opportunity, and a great temptation, to commit perjury. *Smith, C. J.,* said, in the *McLeary case,* that "The proposition presupposes an admis-

sion, or a statement from which an admission may be inferred, injurious to the deceased or lunatic, and it is disallowed because the party is unable to give his version of the matter." But this, he argues, does not apply merely to actions or conduct of the deceased, or his or her transactions or communications with the witness which do not tend to fix the deceased with liability or to discharge her from it, but merely indicates the state of the mind or faculties. The final conclusion was that conversations and transactions mentioned in the Code, of which a living witness is not permitted to testify when the other party to it is dead, insane, or lunatic, and unable to give his version of them, do not, in our construction of the language and purposes of the law, embrace such evidence as was here offered and rejected, and is outside the mischief intended to be remedied.

The case of *Brown v. Adams,* 174 N. C., 490, is not like this case, for there the attempt was to prove a conversation of the deceased for the purpose of fixing liability upon Mr. Adams's estate, when he, of course, and those claiming under him after his death had no opportunity to confront the witness with his testimony or that of any other witness. That is the very case described by *Chief Justice Smith* in *McLeary v. Norment, supra,* where he attempts to make clear the distinction between it and a case like this one, where the object merely is to show the mental condition and not the truth of the deceased's declarations. *Brown v. Adams* related to the terms of a contract, and was not remotely connected with the state of Mr. Adams's mind or his physical condition.

It follows that there must be another trial because of the error in excluding this testimony, which was competent. But we may properly add that in the questions asked and the answers that would have been given if permitted by the court, we do not see any reference to transactions and communications with the deceased. The opinions of the witnesses may have been derived from other sources.

The testimony as to the administration of morphine and chloroform was also improperly excluded. With the evidence of the medical expert, it tended to show the weakened state of the testator's mind and was some proof of mental derangement and incapacity.

New trial.

A. WILLIAMS v. W. H. BIGGS.

(Filed 11 September, 1918.)

Wills—Devise—Deeds and Conveyances—Estates—Contingent Limitations—Title—Parties Interested—Fee Simple—Warranty—Heirs at Law.

Where lands are devised to the named sons of the testator, "to each one of them, and in case either one shall die without a lawful heir, then his share shall descend to the surviving ones and their heirs forever"; and one of these sons has died without issue, and the others have executed, in form, a sufficient deed with warranty, conveying the fee-simple title to the lands, it is immaterial whether the estate vested absolutely in the survivors at the death of one of the sons or created a succession of survivorships, for every one having joined in the deed who could presently or ultimately take under the devise, the conveyance will pass a fee simple, or absolute title, as the warranty is binding upon the heirs of the grantors.

CONTROVERSY without action, submitted upon the following statement of facts under section 803 of the Revisal of 1905, and decided by *Kerr, J.*, at the June Term, 1918, of MARTIN.

On or about 15 April, 1918, A. Williams bargained and sold to W. H. Biggs a certain tract of land mentioned and described in item 2 of the last will and testament of Eli H. Roberson, for the sum of $5,000, and has executed and tendered to W. H. Biggs a deed for the land, which purports to convey a fee-simple estate therein.

James A. Roberson, mentioned in item 2 of will as one of the devisees, is dead, leaving no children. George E. Roberson, Joseph L. Roberson, and Theo. Roberson, devisees mentioned in item 2 of said will, are living, and all have children. The said devisees have complied with the provision in the will in regard to the one thousand dollars given to the daughters.

Joseph L. Roberson, George E. Roberson, and Theo. Roberson, the surviving devisees named in item 2 of the will, executed a deed purporting to convey said land in fee simple, and plaintiff has acquired the land by mesne conveyance from the grantees thereof.

A. Williams has tendered to W. H. Biggs a deed for the land devised in item 2 of the will and acquired by him as aforesaid, which deed purports to convey to W. H. Biggs a fee-simple estate of the land. W. H. Biggs refuses to accept the deed and pay the purchase price upon the ground that by reason of the provisions of item 2 of the will A. Williams cannot convey a good and indefeasible title, for that the devisees mentioned in item 2 of the will did not take a fee-simple estate therein. W. H. Biggs stands ready, able and willing to pay to A. Williams the purchase price, to wit, $5,000, but refuses to pay the same, upon the ground that Williams cannot make a good title to the land.

Upon the foregoing statement of facts, plaintiff contends that under item 2 of the will the devisees therein take a fee-simple estate, and A. Williams can convey nothing more than a life estate, as that is not all the devisees acquired under the will.

If the Court sustains the contention of the plaintiff, judgment shall be entered directing the payment of the purchase price upon delivery of a deed with full covenants and warranty; and if otherwise, judgment shall be entered against the plaintiff for costs.

Item 2 of the will of E. H. Roberson is as follows: "I give and bequeath to my sons, George E., Joseph L., James A., and Theo. Roberson, my entire tract of land which I purchased from Henry Rogerson and wife, known as the Dugan tract of land, George's share to contain that part on which his house is built, to be equally divided between them, but to be bound to the making good to each of my daughters, Louisa Bateman, Della Swain, and Ida Roberson, the amount which the proceeds of my perishable property will or may lack of one thousand dollars, to each one of them; and in case either one of my said sons shall die without a lawful heir, then his share shall descend to the surviving ones of my sons and their heirs forever."

The court entered judgment for the plaintiff and against the defendant for the costs, and the latter appealed.

Critcher & Critcher for plaintiff.
Wheeler Martin for defendant.

WALKER, J., after stating the case: It will not be necessary to discuss the several questions argued in the brief as to when the estates of the sons became absolute. They undoubtedly acquired under the terms of the will vested interests which were subject to be divested upon the happening of the contingent event mentioned in the will. *Starnes v. Hill*, 112 N. C., 1; *Whitesides v. Cooper*, 115 N. C., 570; *Whitfield v. Garris*, 134 N. C., 24; *Hobgood v. Hobgood*, 169 N. C., 485, and cases cited at p. 489.

It is clear, as the presiding judge decided, that however we construe the devise, whether as vesting the estate absolutely in the survivors at the death of James A. Roberson, who died without issue, or as creating successive survivorships, the deed tendered by the plaintiff, who derived his right and title under a deed executed by the three surviving brothers for the land, will convey a good title to the defendant. This is true, because every one who could take an interest under the devise in the will has joined in the deed to certain grantees under whom the plaintiff claims title by mesne conveyance, and it is the same as if they had conveyed directly to the plaintiff. In any view of the case, the estate was

vested absolutely either in all the surviving brothers, or ultimately will so vest in some one or more of them. If any one of them should die, leaving heirs, his share would descend to such heirs, who, though, would be bound by his deed as the warranty in the deed of the ancestor will conclude and estop or rebut the heir who takes by descent. Of course, where the heirs, issue or children, are so designated as to take by purchase, under the terms of the will, there is no estoppel or rebutter as they do not take from their ancestor by descent, but directly from the devisor as purchasers. *Whitesides v. Cooper, supra.* But whether all the sons die without issue or some die without leaving issue, and others die leaving issue, all parties have joined in the deed who have or will have the title to the land.

We are of opinion that the plaintiff has derived his title from parties who, if not owners of the land at the time they conveyed it to him, will eventually become the owners in fee simple absolute, and therefore that all interest therein has passed to him. It follows that the deed tendered to the defendant will convey to him a good and indefeasible title. *Hobgood v. Hobgood, supra,* citing *Kornegay v. Miller,* 137 N. C., 659.

In *Hobgood's case* it was said by *Justice Hoke:* "In Kornegay's, as in this, the ultimate devisees were ascertained and designated by name, and they having the contingent estate, it was held that they could convey it, and their descendants or heirs, having to claim through them, were concluded by the deed of the ancestors," citing also *Bodenhamer v. Welsh,* 89 N. C., 78.

The decision of the learned judge was correct.

Affirmed.

CHARLES F. DUNN v. CLERK'S OFFICE.

(Filed 11 September, 1918.)

Clerks of Court—Fees—Supreme Court—Docketing Transcript.

The appellant's undertaking does not cover the fee of the clerk of the Supreme Court in docketing the case, and the clerk is in the exercise of his right in refusing to docket the transcript where he has demanded the prescribed fee in advance and its payment has been refused. Revisal, secs. 2804, 1250.

WALKER, J. This is a motion to docket the transcript of an appeal taken by the defendant in the case of Jake Sutton v. Charles F. Dunn, which it appears was tried in the Superior Court of Lenoir County, and in which judgment was entered for the plaintiff, Jake Sutton. The

clerk here refused to docket the transcript because, upon demand, the appellant, Charles F. Dunn, refused to pay the costs allowed for docketing. The appellant contended that he was not required by the law to pay such costs to the clerk of this Court in advance.

Waiving the question whether the appellant has tendered to the clerk such a transcript as entitled him to have it docketed, and assuming that he has, we are of the opinion that the clerk had the right to require the payment of the fee before docketing the same. The question is not an open one, it having been settled long ago by several of the cases that the clerk is entitled to demand such payment. The case of *Martin v. Chasteen*, 75 N. C., 96, is conclusively against the appellant. *Justice Rodman* there said: "As is well known, the object of an undertaking by an appellant is not to secure the fees which the appellant may become liable for to the officers of the court pending his appeal, but only to secure reimbursement to the appellee of such fees as he may have to pay. The act puts an appellant who has complied with its conditions in the condition he would have been in if he had given an undertaking. Now an appellant who has given an undertaking is not entitled to the gratuitous services of the officers of the court, but must pay for them as he procures them if the officers demand it. *Office v. Lockmand,* 12 N. C., 146. We think the clerk of this Court had a right to demand payment of his fee for docketing the appeal before he performed the service, and he was not compelled to perform it gratuitously."

And to the same effect is *Clerk v. Wagoner,* 26 N. C., 131, where *Chief Justice Ruffin* said: "It has been usual for the officers of the Court to indulge the successful party for his costs until a return of his execution therefor against the party cost. If raised on that execution, the officers, instead of the party, receive them, and thus the matter is settled. But it is clear that every party may be required to pay his own costs as they are incurred, or at any time when demanded. It is incident to every court to have a jurisdiction over its suitors and officers to regulate the taxing and payment of the proper costs, and for that purpose to make rules on those persons and enforce them by attachment." The latter case was approved in *Long v. Walker,* 105 N. C., 97. See, also, *Brown v. House,* 116 N. C., 859; *Merritt v. Merritt,* 2 N. C., 20; *Speller v. Speller,* 119 N. C., 358; *Andrews v. Whisnant,* 83 N. C., 446 (where the question is fully and clearly discussed by *Justice Dillard*). The point is further considered and decided in *Bailey v. Brown,* 105 N. C., 129; *Ballard v. Gay,* 108 N. C., 544; *S. v. Nash,* 109 N. C., 822.

It was held in *Ballard v. Gay, supra,* that a clerk can demand payment of his fees in advance, and that this could be done under the statute (The Code, sec. 3758; Revisal, sec. 2804), and even under the com-

mon law, citing *West v. Reynolds,* 94 N. C., 333, and also the other cases to which we already have referred.

But the statute, Revisal, sec. 2804, expressly provides that the clerk (and other officers therein mentioned) shall receive fees, which are prescribed for them respectively, from the persons for whom, or at whose instance, the service shall be performed, and no officer shall be compelled to perform any service unless his fee be paid or tendered.

There are exceptions to this provision, but they do not extend to this case. Revisal, sec. 1250, also provides, impliedly, the same thing. So it follows that the refusal of the appellant to pay the fee for the service when demanded deprived him of the right to have the transcript docketed, and fully justified the action of the clerk. It appears that the appellant has not entitled himself to ask any favor of the clerk (or of this Court, if it had any discretion in regard to the matter), but that his conduct has been such as to require of him a strict compliance with the law.

The clerk acted strictly within his legal right, which is clearly given by the law, and the motion therefore is denied with costs.

Motion denied.

SOPHRONY WOOTEN v. GRAND UNITED ORDER OF ODD FELLOWS.

(Filed 11 September, 1918.)

1. Insurance, Life—Change of Beneficiary—Conditional Interests—Application—Rules and Regulations.

A beneficiary under a life insurance policy, with reasonable rules and regulations of the company providing that the insured may change, the beneficiary acquires only a condition interest under the term of the policy until the death of the insured; and where the policy or rules of the insurer provides that such change may be made in a particular way, the method prescribed should be followed; but when the insured, by his affirmative act, has substantially done all that is required of him, or what he is reasonably able to do, to effect a change of the beneficiary, with nothing remaining to be done except the ministerial acts of the insurer, the consent of the beneficiary is not necessary and the change will take effect though the formal details are not completed by the insurer before the death of the insured. The company itself consented in this case.

2. Same—Equity.

Where the insured, given the right to change the beneficiary in his policy of life insurance, has pursued the course required by the policy and the rules of the association, and have done all in his power to make the change, but dies before the new certificate is actually issued, leaving only the ministerial acts of the company to be done in perfecting the change,

equity will decree that to be done which ought to be done, and will act as though a new certificate had been issued or the change contemplated had been made.

3. Same—Acceptance—Waiver.

Where, under the rules and regulations of a life insurance company, the insured is given the right to change the beneficiary, with the consent of the company, the required consent is solely for its protection, which it may waive by accepting the written notice and making entry of the change on its policy record, etc.; and the beneficiary, as changed, having an insurable interest, will be entitled to the proceeds of the policy, though the company had issued the new policy thereafter, and after the death of the insured.

4. Same—Implied Promise—Parol Agreement.

Where the insured has the right to change the beneficiary of his policy of life insurance, under the rules and regulations of the company, by a prescribed method, which he has followed and which has been accepted by the company, the acceptance by the company is equivalent to an implied agreement that the proper change had been made in sufficient form, or to an implied promise to make the change, which will be upheld, where the issuance of another policy is required, as an oral promise to insure. *Floars v. Insurance Co.*, 144 N. C., 232, cited and applied.

5. Same—Lost Policy—Reissuance.

Where the insured has the right to change the beneficiary of his life insurance policy by having the change made on the face of the policy, which has been lost, or to the reissuance of the policy as changed, and has followed the method prescribed by the rules and regulations of the company in requesting the latter, which has been approved by it, its approval of the request, or assent thereto, is sufficiently formal, and the proceeds of the policy are payable to the beneficiary as thus changed, though the policy was not actually issued until after the death of the insured.

6. Insurance—Evidence—Principal and Agent—Policies—Change of Beneficiary.

It is competent for the local officer of an insurance society, who has been requested by the insured, since deceased, to write out his application for a change of beneficiary of his policy of life insurance, where the policy has been lost, and the request approved by the company, to state what the insured said to him at the time he wrote the application for him.

7. Insurance—Parol Evidence—Writing—Independent Fact.

It is competent for the proper officer of an insurance order to state that a written application for the change of beneficiary under a policy of insurance had been received at his office, as an independent fact; and it is not objectionable on the ground that the writing is the best evidence.

8. Appeal and Error — Harmless Error — Insurance — Parol Evidence — Writing—Independent Fact.

Where the insured has had done all that is required of him by the rules and regulations of the insurance company to change the beneficiary of his policy, testimony of the proper officer of the company that the written application had been received at his office, if incompetent, is harmless error.

9. Appeal and Error — Objections and Exceptions — Evidence — Motion to Strike Out.

Where competent and incompetent evidence is given on the trial of an action, the refusal of a motion to strike out the whole is proper, as the objection will not be confined to the incompetent part by this Court on appeal.

10. Appeal and Error—Harmless Error—Evidence—Result.

Incompetent evidence, admitted on the trial, will be considered as harmless error, on appeal, when it is not of sufficient importance to have affected the result.

ACTION tried before *Connor, J.*, and a jury, at April Term, 1918, of BEAUFORT.

The plaintiff sued to recover the amount of a life policy issued to Thomas Whitaker by the defendant, and payable, at first, to his sister, the plaintiff, as beneficiary, and afterwards changed so as to be payable to his wife, Colorado Whitaker, under a clause reserving the right to change the beneficiary. The right to make this change was not disputed by the plaintiff, but she contends that the change was not actually or legally made, so as to make it effective, before the death of Thomas Whitaker. The latter was a member of the Stone Square Lodge, No. 1688, at Washington, N. C., where he lived, and the policy was issued by the District Grand Lodge and was made subject to its laws, rules and regulations, one of which was that "The beneficiary may be changed on the face of the policy by returning it to the endowment office, certifying change desired, and enclosing 10 cents." The evidence tends to show that, a short time before his death, Thomas Whitaker applied in writing for a change of the beneficiary from his sister, Sofrony Wooten, to his wife, Colorado Whitaker, whom he had married since the policy was issued. This application was duly received by the Grand Lodge, and as there was some objection to the form, though substantially correct, another was made in the form prescribed for the purpose, and was also received by the lodge before his death, and accepted as a full compliance with the rules and regulations; and after the death of the insured, Thomas Whitaker, the amount of the policy was paid to his widow, who was the new beneficiary. The policy had been lost, and the change on its face could not be made at the time of the application, but on 21 October, 1916, a new policy was issued by the lodge. This was after the death of Thomas Whitaker, which occurred on 18 September, 1916. The "laws, rules and regulations" of the lodge provide that a "Duplicate policy may be secured, in case of loss of policy, by making application, signed by the member and countersigned by the N. G. and P. S., with lodge seal attached, upon payment of 10 cents, which application shall be attached to the policy when so issued." Thomas Whitaker, in his

application asking for a change of the beneficiary, also requested that a new policy be issued to his wife. It appeared that the change of beneficiary was made in the office of the secretary of the Grand Lodge in September, 1916. The policy register, at the time of Thomas Whitaker's death, showed that Sofrony Wooten was the beneficiary in the policy, but that an application for change of beneficiary had been made, and that at that time only one policy had been issued. There were objections by the plaintiff to certain evidence of the witnesses, Daniel Roberson and P. A. Richardson, respectively, secretaries of the local lodge and the Grand Lodge, and a motion to strike out the testimony of the latter, which were overruled. They will be noticed hereafter.

The plaintiff tendered these issues:

1. Did the defendant, prior to death of Thomas Whitaker, reissue a policy upon life of Thomas Whitaker, making Colorado Whitaker the beneficiary thereof?

2. If so, was the said change of beneficiary in said policy authorized by application of Thomas Whitaker.

The court submitted issues, upon which the jury rendered the following verdict:

1. Did Thomas Whitaker, the insured, prior to his death, direct the secretary of the local lodge, Daniel Roberson, to sign an application for him, and arrange that the beneficiary under his insurance policy should be changed from Sofrony Wooten, his sister, to Colorado Whitaker, his wife? Answer: Yes.

2. Was the original policy then misplaced or lost, so that the insured, Thomas Whitaker, could not surrender it with his application for change of beneficiary? Answer: Yes.

3. Did the insurance company make the change of beneficiary, as requested, prior to the death of Thomas Whitaker, waiving the requirement for the surrender of the original policy? Answer: Yes.

Judgment for defendant, and appeal by plaintiff.

John G. Tooly and Harry McMullan for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

WALKER, J., after stating the case: It is now considered that an insurance company may make reasonable rules and regulations by which the insured may change the beneficiary named in the policy of insurance, or his certificate in the case of benefit societies, and that such rules and regulations become a part of the contract. Where the policy or rule of the company, or society, provides that such a change may be made in a particular way, the method prescribed should be followed, but if the insured has done substantially what is required of him, or what he is

able to do, to effect a change of beneficiary, and all that remains to be done are ministerial acts of the association, the change will take effect, though the formal details are not completed before the death of the insured. It must be understood, however, that some affirmative act on the part of the insured to change the beneficiary is required, as his mere unexecuted intention will not suffice to work such a change. When the right to substitute another beneficiary exists by express reservation, or otherwise, the insured, or member of a benefit society, may, without the consent of the original beneficiary, and subject only to the rules of the association, change his beneficiary at will. *Pollock v. Household of Ruth,* 150 N. C., 211. This is true, because the beneficiary whose right, under the policy, or certificate, may thus be taken away, has only a contingent interest therein, which will not vest until the death of the insured. The revocation of his appointment as beneficiary does not require his consent, as the power to displace him is vested solely in the insured, provided he proceeds in substantial compliance with the rules of the association, which may be waived by the company, or society, where they are made for its benefit or protection.

The general rule is that the right to a policy of insurance, at least to one of the ordinary character, and to the money which may become due under it, vests immediately, upon its being issued, in the person who is named in it as beneficiary, and that this interest, being vested, cannot be transferred by the insured to any other person (*Central National Bank v. Hume,* 128 U. S., 195) without his consent. This does not hold true, however, when the contract of insurance provides for a change of the beneficiary by the insured, or such a right arises in some other way, for in such a case the right of the beneficiary vests conditionally only, and is subject to be defeated by the terms of the very contract, or instrument, which created it, and is destroyed by the execution of the reserved power. These principles, we take it, are well settled by the highest authority and great weight of judicial opinion. 4 Cooley's Briefs on the Law of Insurance, par. 3762-3772; *Nally v. Nally,* 74 Ga., 669; *McGowan v. Supreme Court of Ind. Order of Foresters,* 104 Wis., 173; *Schoenan v. Grand Lodge,* 85 Minn., 349; *Sanburn v. Black,* 67 N. H., 537; *St. L. Pol. Assn. v. Strode,* 103 Mo. App., 694; *Luhrs v. Luhrs,* 123 N. Y., 367; *Donnelly v. Burnham,* 86 App. Div. (N. Y.), by Hun., p. 226 (Aff. in same case, 177 N. Y., 546); *Hancock Mut. L. Ins. Co. v. White,* 20 R. I., 457. From these cases, which very strongly and, we may say, conclusively support the defendant's contention, it seems to be now well settled that one who is insured, with the right to change the beneficiary, and who wishes to exercise this right, must make the change in the manner required by his policy and the rules of the association, and that any material deviation from this course will render the attempted change

ineffective. It is equally well settled that there are cases where literal and exact conformity with the requirements of the policy may be excused. The subject was fully considered in *McGowan v. Supreme Court of Ind. Order of Foresters, supra,* where it was said that *Supreme Conclave v. Cappella,* 41 Fed Rep., 1, exhaustively reviewed this question in its entire phase, and the Court there reached the conclusion that there were three exceptions to the rule of exact compliance with the terms of the policy, or certificate: first, where the society has waived strict compliance by issuing a new certificate without insisting on the performance of all the intermediate steps; second, where, by loss of the first certificate without fault, its surrender becomes impossible, a court of equity will not require an impossibility, but will treat the change as made if the insured has taken all the other necessary steps and done all in his power to make the change; third, where the insured has pursued the course required by the policy and the rules of the association, and done all in his power to make the change, but before the new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and will act as though a new certificate had been issued, citing *National Assn. v. Kirgin,* 28 Mo. App., 80; *Isgrigg v. Schooley,* 125 Ind., 94; *Grand Lodge v. Noll* (Mich.), 15 L. R. A., 350, note; *Marsh v. Supreme Council,* 149 Mass., 512; *Luhrs v. Luhrs,* 123 N. Y., 367; Bacon Ben. Soc. (new ed.), pp. 310, 310a.

In *Donnelly v. Burnham, supra* (which, as we have seen, was approved and affirmed by the Court of appeals of New York), the acts done by the policyholder were essentially the same as those done in this case, and the new policy, or certificate, was mailed to his address after his death, and the Court said: "It will be seen, therefore, that the deceased had in this case done all that was in his power, before he died, to make this change in the beneficiary under his certificate. The association had no reason for refusing the new certificate, and no interest in so refusing. No discretion in the matter. Its action in receiving the application and issuing the new certificate was merely formal and related back to the time when the application was delivered to the secretary of the branch of the association. The by-laws of the association provided for nothing to be done by the deceased after the delivery to the branch secretary. Everything to be done thereafter was to be done by the association and its officers and agents in the formal steps necessary to carry out and complete the change made by the deceased," citing *Luhrs v. Luhrs, supra,* as approved in *Thomas v. Thomas,* 131 N. Y., 205; *Fink v. Fink,* 171 N. Y., 624; *Lahey v. Lahey,* 174 N. Y., 146. In the *Luhrs case* the facts were also similar to those we have here, and the Court said, in making the same ruling: "The certificate, when issued, may be thus regarded as relating back, on the ground that it is merely and purely a formal act on the part

of the Supreme Lodge, registering and giving written evidence of a transaction, all the material facts of which had occurred during the lifetime of the deceased. No new rights were brought into being by the action of the Supreme Lodge after the death of the member, but that action simply gave the proper written evidence to the beneficiary of the existence of those rights which had in fact accrued before the formal issuance of such written evidence." The Court further said in that case: "There is nothing in the point that the deceased, having designated his wife as the beneficiary, could not thereafter deprive her of the money due upon the policy. The contract was one provided for by and in accordance with the constitution and by-laws of the organization, and the original certificate was issued subject thereto, and it was the undoubted law that if the rules and regulations were complied with, the beneficiary could at any time be changed by the direction of the member." The identical contention which was made here by the plaintiff was considered in *Sanborn v. Black, supra*, and treated in the same manner as it was by the courts in the cases just mentioned, the Court saying in its opinion: "It is not claimed that any reason existed in this case for withholding consent. The person designated as beneficiary is one of a class entitled to become such, and, so far as appears, is unexceptionable in all respects. One purpose of the by-law was to secure to the association reliable evidence of every change in beneficiaries, so that it would know to whom it was liable upon the death of a member, and be protected, to some extent at least, from litigation by adverse claimants. *Anthony v. Assn.*, 158 Mass., 322, 324; *Supreme Council, Amer. Legion of Honor, v. Smith*, 45 N. J. Eq., 466; *Supreme Conclave v. Cappella*, 41 Fed. Rep., 1, 4. Here this purpose was fully accomplished. Black's designation was sufficient, in form and substance. It was forwarded to and received by the association several days before his death. He did all that he was required to do, all that he could do, to complete the transfer of the association's obligation to Louisa. There being no sufficient reason to justify other action on the part of the directors, he had the right to have the transfer consented to by them and recorded. The only reason suggested why consent was not given and record was not made is because the directors did not meet before his death after receiving the assignment. If they had met and declined or neglected to consent, and Black had lived, law or equity would have furnished him an adequate remedy to secure his right. *Walker v. Walker*, 63 N. H., 321. Upon his death, Louisa's expectancy became a vested right. She became entitled (as he was, in his lifetime) to insist that the directors should perform their duty under the contract. *Scott v. Association*, 63 N. H., 556; *Connelly v. Association*, 58 Conn., 552; *Virar v. Knights of Pythias*, 52 N. J. Law, 455. Under the circumstances, equity treats that as done

which ought to have been done. *Supreme Conclave v. Cappella,* 41 Fed. Rep., 1; *Isgrigg v. Schooley,* 125 Ind., 94." In that case the policy was changed from the first to the second wife as beneficiary, and the by-laws required the consent of the company to be expressed and recorded, which was not done, though the request of the insured to make the change had been received by it. It was then further said that the association's promise to pay the sum named in the policy to the person designated is absolute, giving the insured the right to choose and to change the beneficiary at will, and thus it is distinguished from the ordinary policy of insurance, as no one has a vested interest to the insurance in the lifetime of the insured, because of this clause as to the selection of the beneficiary. The insurer cannot arbitrarily withhold its consent to the change, nor defeat the will of the insured, by its negligence or bad conduct, as this, the Court said, would go to the destruction of the thing granted, which, according to the well known rule, would pass, discharged of the condition. See *Walser v. Insurance Co.*, 175 N. C., 350, where the right to choose the beneficiary is discussed.

The following language of the Court, in *Schoenau v. Grand Lodge, supra,* at p. 355, is relevant to one phase of this case: "The recorder is stated to be the proper officer to receive the instrument designating the change, and, having elected to accept it, it must be treated as a compliance with the requirements of the lodge. The main question is, did the member succeed in expressing his intention to change the beneficiary? Under the findings of the court, it is clear that he did, and that his desire was made known to the satisfaction of the association, substantially in accordance with the requirements of the constitution." In *Hancock Mut. L. Ins. Co. v. White, supra,* it was held that the beneficiary newly designated is entitled to the fund when the assured has done everything that was necessary on her part to effect the change, the provision for the consent of the company being inserted solely for its protection, and, therefore, one on which it alone can insist; and where it has consented, or waived its consent, the change of beneficiary was sufficiently made. In that case consent of the company had not been given, nor any record made of the transaction on the books of the company, and yet the fund was adjudged as belonging to the person named in the written request for the change. The Court said, in *St. Louis Police Relief Assn. v. Strode, supra:* "As a general rule, the regulations of the association respecting a change of beneficiary should be followed, but well established exceptions to literal compliance exist, as where the society waives a strict observance of its own rules; where it is beyond the power of the insured to comply literally with such regulations; and, finally, where the insured has done all, on his part and in his power, to change the beneficiary, but death intervenes before the full consumma-

tion of the change. *Supreme Council, etc., v. Cappella, supra; National, etc., Assn. v. Kirgin,* 28 Mo. App., 80."

In none of the cases reviewed by us was there any more compliance with the terms of the policy than there was in this instance. But *Nally v. Nally, supra,* bears the closest resemblance to our case in its important facts. There, as here, the policy was payable to the sister, and the insured requested that it be changed, so as to be payable to the woman whom he had subsequently married. No change was made in the policy, which was in possession of the sister, but the officers of the company promised to attend to the matter, but failed to do so. The Court held that the gift to the sister was not perfected, so as to be absolute and irrevocable, there being a clause allowing a change of beneficiary or assignment of the policy. Held, further, that there being no condition in the policy requiring the consent of the beneficiary named therein to a change of any of its terms or of the parties entitled to claim under it; whether such change was to be effected by parol or in writing was a matter entirely between the assured and the company; and if the latter chose to dispense with any of the modes of effecting this purpose, it concerned no third party, nor could the company capriciously refuse the change. The marriage having brought the wife into the designated class, which qualified her to be a beneficiary, and the object of the change being a meritorious one, equity will consider that as done which ought to have been done, and give relief accordingly. Two cases could not be more alike in their material facts than *Nally v. Nally* and this one, except that in this case more was done than was attempted in that one. We might add many other cases to this list which establish beyond question the same doctrine, for there are such, but those cited will suffice to show how well settled the principle is by the decisions of the courts.

In this case the application was written by the insured's friend and an officer of the lodge; it was received by the Grand Lodge, and accepted as a sufficient compliance with the rules of the order. The policy had been lost—destroyed by rats, as the insured believed—and could not be produced for the "change in its face" to be made. A new policy could be issued, of course, but this provision is intended to be at the option of the insured, and if it could be thus issued the lodge should have issued it. But it was content with the written request which it had accepted, which was equivalent to a clearly implied agreement that the proper change had been made in sufficient form, or, at least, to an implied promise to make the change. This Court has held, in *Floars v. Insurance Co.,* 144 N. C., 232, that an oral contract of insurance, or an oral promise to insure, which is executory in its nature, will be upheld if otherwise valid, except, perhaps, in the case of guaranty insurance, citing Vance on Insurance, 148; 1 Beach on Insurance, sec. 438, note 2. That case was

approved in *Lea v. Insurance Co.*, 168 N. C., 478, where numerous cases are cited. The policy which is generally issued upon the oral agreement is only the evidence of the terms of the contract. So, in this case, it was evidently intended that the acceptance of the request, and the assent thereto, was regarded as sufficiently formal, without the change in the face of the policy, especially as the latter was lost, and therefore a literal compliance was not possible. Any further action on the part of the insured, or the proposed beneficiary, was waived by the conduct of the lodge. It would be a singular and unwarranted perversion of justice if we should hold otherwise. The intention of the company to make the change in accordance with the application of the insured is so manifest that no court could well refuse to execute it. In the recent case of *Supreme Council of the Royal Arcanum v. Behrend*, decided by the Supreme Court of the United States, 3 June, 1918 (Advance Opinions, published by L. Coop. Pub. Co., 1 July, 1918, No. 15, at pp. 608-611), *Justice Brandeis* said: "The plaintiff alleged that the certificate had not been surrendered and that she had not been requested to surrender or deliver up the same for change of beneficiary. The latter allegation is denied by the affidavit of defense, and the statements therein contained must be taken as true. But the fact is not material. As indicated by the printed 'Form for Change of Beneficiary,' indorsed on the certificate, which refers to both 'surrender and return,' the requirement of a surrender does not necessarily imply a return to the order of the original paper, called the 'benefit certificate.' Furthermore, requirements of that character are made for the protection of the society, and if complied with to its satisfaction, or if waived by it during the lifetime of the insured, cannot be availed of to support the claim of a former beneficiary."

The question of evidence presents little or no difficulty. The testimony of Daniel Roberson was sufficient to show a compliance with the rule of the lodge, as the policy was lost and could not therefore be produced, and the lodge was satisfied with what Roberson said was done. His testimony was admitted, without objections, save two, which are clearly untenable, it being competent for him to state what the insured said to him, as he was asked by the insured to write out the request to the lodge and sign it for him. This was substantially all of his answer. Roberson could not have performed the service as the insured's agent, unless he knew what the latter wished him to do. The very nature of the question, to which objection was taken, discloses its competency. The other matter was irrelevant. It made no difference who paid the premiums.

It was competent for the witness, P. A. Richardson, to state that the application for the change was received in his office, he being the proper

officer of the lodge to receive it. That was an independent fact, and did not involve any disclosure of the paper's contents.

It generally is true that the writing itself is the best evidence of its contents, but here it was not necessary to prove more than that the insured himself had done all that was required of him, or all that he could do. To speak, therefore, of the change of beneficiary, as made in the records of the lodge, was harmless, if it was not competent. Again, the question, as it was framed, was proper, as also was the direct answer to it. If what the witness afterwards said, under further examination and cross-examination, without any objection entered, except by a motion to strike it out, after it all was in—was objectionable in any respect, the particular part considered so should have been pointed out or specified by objection to it in due time, for some of the mass of testimony was clearly competent; and under a general objection, or motion to strike out, we will not undertake to separate the two and eliminate the incompetent part. *S. v. Ledford,* 133 N. C., 722, where it was said: "The objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done, he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent." *Howard v. Wright,* 173 N. C., 339, 345; *Dunn v. Lumber Co.,* 172 N. C., 137; *Ricks v. Woodward,* 159 N. C., 647; *S. v. Foster,* 172 N. C., 960, and *Goins v. Indian Training School,* 169 N. C., 739, which was an exception to an affidavit (treated as a deposition, by agreement) and a motion to strike it out. The same rule was applied and the motion overruled. But in the view we have taken of this case, on its merits, we are of the opinion that the evidence, even if any of it was incompetent, was harmless or not of sufficient importance to have affected the result or to warrant a new trial. *Goins v. Indian Training School, supra.*

The charge covered all the controverted questions, and was clear and full. It was really a question of fact for the jury whether under the evidence the change of beneficiary had been requested by the insured and he had done all required of him. There was evidence sufficient to support the verdict as a whole, and we find no error in the record.

No error.

J. W. BROWN v. T. W. COSTEN, C. W. HUDGINS, AND W. M. SPARKMAN, COUNTY BOARD OF ELECTIONS OF GATES COUNTY.

(Filed 18 September, 1918.)

1. Elections—Primaries—Courts—Jurisdiction.

In the absence of express statutory provision, the courts of the State have no jurisdiction to interfere with political parties in the choice of their candidates for office, nor to regulate or control the methods and agencies by which they are selected, except by appropriate legal remedies to enforce the performance of plainly ministerial duties or the protection of clearly defined legal rights existent and conferred usually by the Constitution and legislation applicable to the subject.

2. Same—County Boards of Election—Statutes.

Under the provisions of our primary law (chapter 101, Laws of 1915), the right of a voter to cast his ballot therein depends not only upon his legal status, but upon the good faith of his intent to affiliate with the party holding the primary, and his right in the latter respect is left to the determination of the registrar and judges of election, without power vested in the courts to supervise or control their action; and, this being an indeterminate political right, the decision of the county board must be considered final, so far as the courts are concerned, when the primary has been held in all respects in accordance with the provisions of the statute.

3. Same—Injunction.

Where a primary has been held in accordance with the provisions of the statute (chapter 101, Laws of 1915), the courts have no jurisdiction to supervise or review the action of the local board of elections upon the question of whether a certain number of voters were qualified as to their party affiliation, etc., to vote thereat; and temporary injunction against its tabulating and publishing the ballots as returned by the registrars and poll-holders of the various townships, and declaring the nominee of the primary, is properly dissolved.

ACTION heard on return to preliminary restraining order and by consent, before *Whedbee, J.*, decision being filed at July Term, 1918, of GATES.

The action was to set aside the results of a legalized primary for Gates County and restrain the defendants, the County Board of Elections, from tabulating and publishing the results of same, in so far as it affected the selection of the Democratic candidate for sheriff; plaintiff, one of the contestants for the nomination, claiming that on the returns as certified by the poll-holders, his opponent, one C. M. Lawrence, was selected as the nominee, and that this result was brought about chiefly because the registrar and judges of election at several of the voting precincts had wrongfully and willfully refused to receive the votes of a good number of qualified voters, and whose purpose was to vote for plaintiff as the Democratic nominee.

The nature of plaintiff's claim for relief is set forth in his verified complaint, as follows: "That if the Election Board of Gates County are permitted to tabulate and publish said ballots as returned by the registrars and poll-holders of the various townships and declare the said C. M. Lawrence is the nominee of the primary for sheriff under the existing facts and conditions, the injury to this plaintiff will be irreparable, and he is without remedy, save in a court of equity." The prayer for judgment being that the primary election for the irregularities and errors herein set out be declared null and void, and for such other relief as the court may deem just.

On the hearing there was judgment that the restraining order be dissolved, that the results of the primary be forthwith tabulated and declared pursuant to the statute, and the costs taxed against plaintiff.

From which said judgment plaintiff, having duly excepted, appealed.

R. C. Bridger and S. Brown Shepherd for plaintiff.

Aydlett, Simpson & Sawyer, A. P. Godwin, and T. W. Costen for defendants.

HOKE, J. Chapter 101, Laws 1915, purports to provide for a legalized primary, by which the recognized political parties of the State may select their candidates by choice of the *bona fide* party voters.

In section 31 the statute is made to apply to any and all political parties who had candidates for State offices at the general election of 1914, and, in addition, any other political party described as such in a declaration signed by 10,000 legal voters of the State and filed with the State Board of Elections thirty days before the time fixed for State officers to file notices of their candidacy. And a qualified voter at such primary is said to be one who is a qualified voter of the State or who will become one on or before the next general election, and who has "declared and had recorded on the registration book (in a column provided for the purpose) that he affiliates with the political party in whose primary he proposes to vote, and is in good faith a member thereof, meaning that he intends to affiliate with the political party in whose primary he proposes to vote, and is in good faith a member thereof." Statute, secs. 5 and 11.

Provision is also made, both in the general law of elections, made a part of the act when not inconsistent with the terms of same, and in the statute itself, that the qualifications of any elector proposing to vote, and his good faith as to his declared intent to affiliate with the party, may be challenged, and it is made the duty of the registrars and judges of the election to determine whether or not the elector has a right to vote in the primary. Statute, secs. 3 and 11.

In the present case it appears from the allegations of plaintiff's complaint that on 1 June of the present year the primary was duly entered upon, in which the plaintiff and C. M. Lawrence were opposing candidates for sheriff; that the registrars and judges of election for the various precincts were duly appointed for the proper holding of said primary; that, having duly qualified, the votes were deposited in the various boxes under the supervision and according to the rulings of these officials; that at the close of the election, the votes having been correctly tabulated were duly certified to the county board of elections, etc., and that if the county board is permitted to tabulate and compile said returns, as the law requires, it will show that plaintiff's opponent, C. M. Lawrence, has received the nomination.

On these averments, admitted by the defendants to be true, it is proposed by plaintiff to stay further action by the county board and declare the primary void on the affidavits of certain applicants, 65 or 70 in number, that they attended the primary for the purpose of voting for plaintiff and "offering to affiliate with the Democratic party by voting for its candidates in the primary, and by voting for its nominees at the next general election, and they were wrongfully, willfully, and knowingly denied the privilege of voting by the registrar and judges conducting the primary."

If we were permitted to enter on the investigation contemplated in the present action, the relief sought by plaintiff could not be awarded, for the reason that his allegations of fact are not sufficiently sustained. In several of the precincts where the larger proportion of the illegalities are said to have occurred, there are affidavits of the registrar and at least one of the judges and others that no applicant was refused the right to vote, except when on being questioned, as provided by the statute, it appeared that they were not members of the Democratic party and did not in good faith intend to affiliate with such party. Apart from this, there is no allegation nor claim that these rejected applicants had caused their purpose to affiliate with the Democratic party to be written on the registration books as the statute requires (sections 5 and 11), nor that they had been denied the right to do so by the primary officials or others. Nor does it anywhere definitely appear that the reception of the votes in controversy would have changed the result as disclosed by the returns. *DeBerry v. Nicholson,* 102 N. C., 465.

But we are of opinion that the inquiry suggested by these pleadings and the evidence is not open to the courts, nor have they any jurisdiction to pursue or determine it.

It is the recognized position in this country that courts of equity or courts in the exercise of general equitable principles have no power to interfere with political parties in the choice of their candidates nor to

regulate or control the methods and agencies by which they are selected. Time out of mind, courts, in the exercise of these principles, have been restricted to the administration and adjustment of property as distinguished from political rights, and the well-considered authorities on the subject are to the effect that, in the absence of express statutory provision, neither courts of law or equity have jurisdiction in causes of the latter character except by appropriate legal remedies to enforce the performance of plainly ministerial duties or the protection of clearly defined legal rights existent and conferred usually by the Constitution and legislation applicable to the subject. *Britt v. Canvassing Board,* 172 N. C., 797; *In re Sawyer,* 124 U. S., 200; *Hunt v. Hoffman,* 125 Minn., 249; *U. S. Voting Machine Co. v. Hobson,* 132 Iowa, 38; *Shoemaker v. City of Des Moines,* 129 Iowa, 244; *Walls v. Brundidge,* 109 Ark., 250; *Fletcher v. Tuttle,* 151 Ill., 41; *City of Dallas v. Street Ry.,* 105 Texas, 337; *Greene v. Mills,* 69 Fed., 852.

As said by *Associate Justice Phillips* in *City of Dallas v. Street Ry., supra,* "Elections belong to the political branch of the government, and the general rule is that they are beyond the control of judicial power." And it may be added that the free and untrammelled exercise of these political rights, being the very base and buttress of popular government, even express legislation on the subject should be so drawn that the constitutional right of the citizen to vote for the candidate of his choice should always be most carefully safeguarded.

This being in our view the correct position, plaintiff's right to relief must depend upon the proper construction of the primary law, and on perusal of its provisions, it is clear, we think, that the Legislature did not and did not intend to vest the courts with power to enter on an investigation of this character, but has referred the question chiefly involved, the right of an applicant to vote in the primary, to the decision of the election boards at the various precincts. Under the statute, the right so to vote has been made to depend not only on the applicant's status as a legal voter, but on the good faith of his intent to affiliate with the party holding the primary, and, having provided for the selection of the registrar and judges, that they act under the sanction of an official oath, made them indictable for willful neglect or failure to perform their duties properly; and, further, that at the request of the chairman of any political party, the local board shall select some elector of that party to attend and witness the conduct of the primary as an additional guarantee of fair play, the Legislature may have concluded that these local boards were the best tribunal that could be devised to determine the qualifications of a proposed voter. And it may have considered, too, that, in the effort to obtain the general sense of party voters as to a candidate through a legalized primary, it was entirely imprac-

ticable under any court procedure now existent to enter on an extended investigation of this nature involving disputed questions of law and fact with the constitutional right of appeal and have the same ended so as to ascertain and announce the rightful candidate in time for the general election.

Whatever may have been the reason moving to this enactment, the statute in express terms provides (section 11) that whenever the right of a proposed elector to vote is challenged on the ground that he does not affiliate with such party or does not in good faith intend to support the candidates nominated, it shall be the duties of the registrar and judges of election to determine whether or not the elector has a right to vote; and, having so provided and conferred no power on the court to supervise or control their action and in the phase as now presented, this being an indeterminate political right, the decision of the local board must be considered as final in so far as its effect upon the result of the primary is concerned, and it has therefore been properly adjudged that plaintiff is not entitled to any relief within the scope and purpose of his present suit.

The ballots having been deposited in boxes prepared for the purpose, under the supervision and rulings of the registrar and judges at the different voting precincts, the law requires these officials at the close of the primary to count the same and certify a correct return of the vote to the county and State boards of elections, respectively, this according to the nature of the offices, and these boards are directed to tabulate and publish the results, which results when published shall ascertain and determine the regular party candidate. The only provision of the law which authorizes or permits an examination or correction of these returns appears in section 27 of the act as follows:

"That when, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and the State board of elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results, which shall be done under such rules as the State board of elections shall establish to protect the integrity of the election and the rights of the voters."

A power, it will be noted, that arises to these boards only "when, on account of errors in tabulating returns or filling out blanks," the result of the election cannot be accurately known, and confers no authority on the courts, assuredly, to investigate and pass upon the methods or manner in which the primary may have been conducted.

The suggestion that the act incorporates certain provisions of the general election law which might affect the interpretation is without significance, for in all cases where this occurs the statute itself contains

provision that the reference shall only prevail when not inconsistent with the terms of the primary law, the controlling provisions of which are as heretofore shown. In support of the right to maintain his action, we were cited by plaintiff to *Johnston v. Board of Elections,* 172 N. C., 162, but the case does not support his position. In that case, the primary having been conducted pursuant to law and the result declared, showing that plaintiff Johnston was entitled to the nomination, the court entertained an application for a writ of mandamus compelling the election board to place the name of plaintiff upon the party ticket, this being a clearly defined legal right expressly conferred by statute, and the writ being the appropriate common-law remedy available in such cases.

Speaking to the question in *Johnston's case,* the Court said: "While ordinarily courts may control political parties in the selection of their candidates for office, this principle does not apply where the Legislature, in the exercise of its powers, has taken control of the subject and enacted a statute conferring on successful contestants in a legalized primary certain specified and clearly defined legal rights and enjoined upon an official board ministerial duties reasonably designed to make these rights effective."

This decision is in clear illustration of the principle heretofore stated and approved, that while the courts, by appropriate common-law remedies, may interpose for the purpose of enforcing plainly ministerial duties or to protect clearly defined legal rights, it may not, without express legislative provision, resort to general equitable principles involving an interference with recognized political rights and methods by which the candidates of the different political parties are chosen.

On the record, plaintiff is not entitled to relief, and the judgment to that effect is

Affirmed.

PATTIE W. PERRY v. BRANNING MANUFACTURING COMPANY.

(Filed 18 September, 1918.)

1. Negligence—Fires—Prima Facie Case—Burden of Proof.

Where there is evidence tending to show that damage by fire to plaintiff's land had been caused by defendant's engine, a *prima facie* case of negligence is made out, shifting the burden of proof on the defendant to show that the fire was not due to any defective condition of the engine or to any negligence of its employees in its management or operation.

2. Evidence — Corroboration—Instructions—Requests—Appeal and Error—Rules of Court.

A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. Rule 27, 164 N. C., 438.

3. Negligence—Evidence—Fires—Defective Engines.

Where there is evidence tending to show that defendant's engine set out fire to the damage of the plaintiff's land, testimony of a witness that he had seen the same engine casting sparks a number of times before the fire started is competent.

4. Appeal and Error—Evidence—Prejudice—Harmless Error.

Testimony that is irrelevant, uncertain, and indefinite, and which does not appear to have prejudiced the appellant's right, and which could not have influenced the verdict, will not be considered as reversible error on appeal, nor will unanswered questions be so considered unless it is in some sufficient way made to appear to the court that their exclusion was prejudicial to his rights.

ACTION tried before *Kerr, J.*, and a jury, at February Term, 1918, of BERTIE.

The action was brought to recover damages for the negligent burning of timber and other property on plaintiff's land. There was evidence tending to show that the fire was set out on the land by the defendant and came from the latter's engine. The court charged that if the fire was caused by the defendant's engine emitting sparks or coals, which fell upon the plaintiff's land and caused the fire, the burden would be shifted to the defendant to show that the fire was not due to any defective condition of its engine, nor to any negligence in its management or operation. There were other instructions, to which no exceptions were taken. Certain questions of evidence are raised which will be noticed in the opinion.

The jury returned a verdict for the plaintiff on the issue as to negligence, and assessed her damages at $2,800. Judgment was entered upon the verdict, and defendant appealed.

Winborne & Winborne and Gilliam & Davenport for plaintiff.
Pruden & Pruden and Winston & Matthews for defendant.

WALKER, J., after stating the case: There was ample evidence to show that the fire was caused by the defendant's engine, and the charge of the court, as to the burden of proof, is fully sustained by numerous cases heretofore decided in this Court. We will cite only a few of them: *Knott v. R. R.*, 142 N. C., 238; *Williams v. R. R.*, 140 N. C., 623; *Whitehurst v. R. R.*, 146 N. C., 591; *Cox v. R. R.*, 149 N. C., 86; *Currie*

v. R. R., 156 N. C., 419; *Aman v. Lumber Co.*, 160 N. C., 369, and the recent case of *Mears v. Lumber Co.*, 172 N. C., 289, where the subject is fully discussed and many authorities cited, the entire trend of which is strongly against the defendant's contention in this appeal. We held in those cases that the authorities place the burden on the defendant to rebut the presumption of negligence, arising from proof connecting it with the origin of the fire, by evidence which will satisfy the jury that the engine was properly equipped, that competent men were in charge of it, and that it was prudently operated; "and necessarily the burden of the issues embracing these facts alone is on the defendant." *Currie v. R. R.*, 156 N. C., 423, where it is said that the presumption of negligence arising from the fact of setting out the fire which caused the burning is one of fact and not of law, and is itself evidence of negligence; and, further, that the evidence in the case should be submitted to the jury to find the ultimate fact in connection with the presumption of evidence and the burden which is imposed upon the defendant or person against whom the presumption arises. We said in *Kornegay's case, supra:* "When it is shown that the fire originated from sparks which came from the defendant's engine, the plaintiff made out a *prima facie* case, entitling him to have the issue as to negligence submitted to the jury, and they were justified in finding negligence, unless they were satisfied, upon all the evidence in the case, that in fact there was no negligence, but that the defendant's engine was equipped with a proper spark-arrester and had been operated in a careful or prudent manner." The reason for the presumption in such a case was well stated by *Chief Justice Smith*, in *Aycock v. R. R.*, 89 N. C., 329, which was approved by the Court, through *Justice Burwell*, in *Haynes v. Gas Co.*, 114 N. C., 203, and in many subsequent cases, as follows: "A numerous array of cases are cited in the note (*R. R. v. Schurtz*, 2 Am. & Eng. R. R. Cases, 271) in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks, while the author favors the class of cases which impose the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this State, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is just that he should be allowed to say to the company, 'You have burned my property, and if you are not in default, show it, and escape responsibility.'" It is said in *Moore v. R. R.*, 173 N. C., at p. 313: "There is no difference of opinion as to the law applicable to this case. It is settled that if the

plaintiff has introduced evidence sufficient in probative force to justify a jury in finding that the fire was caused by a spark from defendant's engine, the issue should have been submitted, the weight of the evidence being a matter for the jury. In such case the defendant is called upon to prove that its engine was properly equipped and operated. If so equipped and operated, there is no negligence or liability upon the part of defendant," citing *Williams v. R. R.*, 140 N. C., 624; *Aman v. Lumber Co.*, 160 N. C., 371; *McRainey v. R. R.*, 168 N. C., 571. We therefore hold that the charge of the learned judge was correct, as it followed the established precedents. *Boney v. R. R.*, 175 N. C., 354.

The testimony of W. M. Stokes, to which defendant excepted, was competent in all respects. What he said to C. V. Liverman, defendant's witness, was corroborative of his own testimony as to the fire. *Whitehurst v. R. R., supra; Matthews v. Insurance Co.*, 147 N. C., 342; *Bowman v. Blankenship*, 165 N. C., 519; *Elliott v. R. R.*, 166 N. C., 481. The particular ground of the objection, as stated in the brief of defendant, is, that it was not restricted by the judge to the purpose of corroboration. But the record states that it was, and we are bound by the statement. At any rate, there was no request that it be so restricted. This evidence having been so confined, the argument that the declaration was made to Mr. Liverman, superintendent of the defendant, is of no avail; and, further, it is evident that it was not permitted to be used for the purpose of charging the defendant with liability.

It may be well to remind the profession of Rule No. 27, which was adopted some time ago (164 N. C., p. 438), by quoting it again: "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted."

The statement of the witness, W. M. Stokes, that he had seen the same engine casting sparks a number of times before the fire started, was competent. *Knott v. R. R.*, 142 N. C., 238; *Whitehurst v. R. R., supra; Daniels v. R. R.*, 158 N. C., 418; *Kerner v. R. R.*, 170 N. C., 94; *Meares v. Lumber Co.*, 172 N. C., 289. See, also, *Texas, etc., R. R. Co. v. Watson*, 190 U. S., 287, and *Texas, etc., R. R. Co. v. Roseborough*, 235 U. S., 429.

The question in regard to the sale of land by the grandmother, if relevant and otherwise competent, was too uncertain and indefinite; and as to the question relating to the defendant's survey of the land, it was not

necessary to notify the plaintiff, and it was immaterial whether she was notified or not. The exclusion of the question asked the witness, L. E. Stokes, when he was recalled, is not well taken, and, besides, is harmless. The question was a mere repetition of the defendant's cross-examination of the witness when on the stand the first time, and the question of damages was then exhaustively investigated. It does not appear that his answer would have been favorable to the defendant, nor does it appear what his answer would have been, so that the Court can see that the ruling was prejudicial. In *Jenkins v. Long*, 170 N. C., 269, the question, "Did you ask where he was?" was excluded. *Justice Allen* said: "There is nothing on the record to show what would have been the answer of the witness, nor what was expected to be proved, and we cannot see that the defendants have been prejudiced by the ruling of the court. It may be that the witness did not ask where the plaintiff was, or, if he did, that the person of whom the inquiry was made did not know, or, if he knew, that she would not tell him, or, if she told him, that the answer would not be prejudicial to the cause of the plaintiff. An appellant is required to show error, and in order to get the benefit of evidence excluded, it must reasonably appear what it is intended to prove, and that the exclusion of the evidence is prejudicial." There are many cases to the same effect. It may be said, generally, that if any ruling upon the evidence was technically erroneous, it was harmless, it having no appreciable influence on the result. *Harris v. R. R.*, 173 N. C., 110. It was held in *Carson v. Insurance Co.*, 171 N. C., 135, that if the exceptions, considered as a whole, are not of sufficient importance, or not so material as to justify a reversal, and when dealt with *seriatim* there is no substantial error in law, the judgment will not be disturbed.

We have already considered the exceptions to the charge and found them to be groundless, and upon a review of the whole record we can find no error therein.

No error.

C. E. WILKINS v. VASS COTTON MILLS.

(Filed 18 September, 1918.)

1. Contracts—Offer to Buy—Acceptance of Offer.

An acceptance of an offer must be in accordance with its terms, without substantial change therefrom, either by word or act, for it to show the agreement of the minds of the contracting parties thereon and become a binding contract.

2. Same—Additional Offer—Rejection.

An offer by telephone to buy 10,000 pounds of 20's and 24's cotton yarns of specified kind, according to specifications of an existing contract, with

weekly shipments to commence thereafter, replied to by telegram, "For immediate acceptance can furnish your order at half-cent advance over other order cotton higher," which in turn was replied to, "Telegram, accept offer make it twenty-five thousand if can make sixteens and eighteens, wire immediately," and followed by telegrams to original offerer, "Cannot increase order we do not make number below twenty": *Held*, the words of the second telegram, "accept offer," was a binding acceptance of the proposition to sell 10,000 pounds of the yarns specified at an advance of half of a cent, and not affected by the rejected proposition to increase the amount to 25,000 pounds upon the condition named.

3. **Contracts—Offers to Buy—Acceptance—Telegrams—Punctuation.**

Where an offer to sell has been made and accepted by telegrams, and, though not punctuated, the messages are so worded that they were fully understood by the parties, the absence of punctuation therein is immaterial.

4. **Contracts—Telegrams—Telephones—Confirmation.**

Where it is customary to follow offers to buy, and acceptances of such, made by telephone and telegraph, with confirmatory letters, for the purpose only of making more certain the terms of the resulting contract, and an acceptance of such an offer has been unconditionally made in full accordance with its terms, the failure of the parties to send such letters will not alter the binding effect of the contract.

5. **Contracts—Offers to Buy—Acceptance—Telegrams—"Wire Immediately."**

Where an offer for the sale of cotton yarns has been made by telegram for immediate acceptance, and immediate reply of acceptance has been sent by telegraph, with a proposition to increase the order in yarns of certain other sizes, "wire immediately," which was rejected, the words, "wire immediately," refer to the new and independent offer to buy, and does not affect the binding force of the accepted offer to sell.

ACTION tried before *Whedbee, J.*, and a jury, at April Term, 1918, of WAYNE.

Judgment of nonsuit upon the evidence, and plaintiff appealed.

This action was brought to recover damages for a breach of contract to sell and deliver cotton yarns to the plaintiff. The nature of the case will appear from the testimony of the plaintiff and other brief excerpts from the record. Plaintiff testified: "I live in Goldsboro, N. C., and have had dealings with the Vass Cotton Mills Company. On 16 October, 1916, I received an inquiry from one of my customers, the Drexel Knitting Mills, at Drexel, N. C. I thereupon, on the same date (16 October, 1916), called up Vass Cotton Mills Company over the long-distance telephone, and talked with Mr. Graham, who is secretary and treasurer of the Vass Cotton Mills, and with whom I had dealt before. I told Mr. Graham that I wanted 10,000 pounds of 20's and 24's, of the same specifications and shipping instructions, and same weekly shipments as under the present contract, which we had at that time, and to begin at the expiration of that contract. He stated that he was not able

to quote at that time; that he had to see about getting cotton, and that he would wire me the next day. On the next day, which was 17 October, 1916, I received a telegram in reply to the inquiry by long-distance telephone of the day before, as follows:

VASS N C October 17th 1916

C E WILKINS *Goldsboro N C*

For immediate acceptance can furnish your order at half-cent advance over other order cotton higher

(Signed) VASS COTTON MILLS

(This telegram was written in capitals, without any punctuation, when received by plaintiff.)

"At that time I had a contract with the defendant, under which it was then delivering at the price of 33½ cents per pound. The original of this contract is in the possession of the defendant. This made the price of yarns of the first contract 34½ cents per pound, basis 20's. The price of the second contract was therefore 35 cents per pound, basis 20's. Upon receipt of this telegram I immediately delivered the following telegram to the Western Union Telegraph Company for transmission to defendant:

GOLDSBORO, N. C., October 17th, 1916.

VASS COTTON MILLS, *Vass, N. C.*

Telegram. Accept offer. Make it twenty-five thousand if can make sixteens and eighteens. Wire immediately.

(Signed) C. E. WILKINS.

(When received by the defendant, this telegram was written in capitals, without punctuation, though it was in the exact form as above set forth when delivered by plaintiff to the telegraph company.)

"To this telegram I received the following by wire:

VASS N C 5 p m October 17th 1916.

C E WILKINS *Goldsboro N C*

Cannot increase order we do not make numbers below twenty

(Signed) VASS COTTON MILLS

5:24 p m

"In my conversation over the phone with Mr. Graham on 16 October, 1916, I had asked him for a price on 10,000 pounds of 20's and 24's to follow present contract, at the same rate of present contract, to be shipped to the same customer. My recollection is, that the contract which I refer to as 'present contract' expired about the first week in

December, 1916. At the expiration of that, the defendant did not ship any yarns on the second contract. I requested them to make shipments, but they did not do so. I first wrote, requesting them to make shipments on this second contract on 19 December, 1916. I did not get a reply to that letter, so I wrote them again on 29 December, in reply to which I received the following telegram:

VASS N C 3:25 p m December 30th 1916.

MR C E WILKINS *Goldsboro N C*

Letter 29th have only one order which is completed can furnish amount Hetrich forty-four cents.

(Signed) VASS COTTON MILLS

4:09 p m

"This was the first notice I had from them that they did not intend to ship on this second contract. The market price for yarns of the character referred to in this contract, on 30 December, 1916, was 43 cents per pound, basis 20's. Upon receipt of this telegram, I took the matter up with them by phone and also wrote them."

There was evidence of a custom to follow up orders by telegram or telephone, with a letter of confirmation to prevent errors in transmission, and when such confirmation was not forthcoming the manufacturer called for it, at his option. Plaintiff, in regard to this custom, testified: "It is a fact that both by telephone and telegraph errors frequently creep in. It is my custom, after transactions by telephone or telegraph, to send letters of confirmation. I did not do this in this instance. It is not a fact that the price of yarns is regulated by the price of cotton. This is not the only order that I had with the Vass Cotton Mill Company in which I failed to send formal order with specific instructions. There is one time I didn't send it until they called my attention to it. I didn't send it with the contract, and they asked me to send a formal order, and I did so. As a matter of fact, I did send specific orders, or formal orders, in each of the other instances. . . . The 2,500 pounds I bought from them was to cover part of this 10,000 pounds which I had contracted for (and which defendant refused to ship). In the one instance, besides this, in which I failed to send what they called confirmation, the company requested it, and I did send it at their request. This is the invariable custom of companies manufacturing yarns. There is no controversy about the first contract. I wish to explain what I said about the price of yarns being regulated by the price of cotton. Of course, it is, primarily, but there are cases in which the price of cotton would advance more, but it doesn't necessarily follow that the price of yarn advances, and this case was one of them. We have a case today,

cotton being broken 5 cents, and the spinners asking the same for yarn as they did before cotton broke. I am also a spinner." . . .

There was no testimony for the plaintiff but his own, just recited. The court refused a nonsuit at the close of plaintiff's testimony.

Defendant introduced in evidence the telegram from plaintiff to defendant, dated 17 October, 1916, in reply to defendant's message of that date to him, as set forth above.

The court thereupon nonsuited the plaintiff, and he appealed.

There is this stipulation between the parties in the record:

"It is admitted in this case that the difference in the value of the yarn on 17 October, the date of the alleged order, and on 30 December, the date that the defendant notified plaintiff that he did not consider it a contract and refused to fill the order, was 8 cents, and that if the plaintiff was entitled to recover anything in this action, to wit, if there was a valid and binding contract, that he is entitled to recover $800. . . . It is further agreed, if the Supreme Court holds upon the evidence as a matter of law, that there was a contract, that this case need not hereafter be tried, but that judgment shall be entered against the defendant for the sum of $800."

D. H. Bland and Teague & Dees for plaintiff.
W. F. Taylor and R. L. Burns for defendant.

WALKER, J. There cannot be a contract unless there is agreement of minds, and an offer can become a binding promise and result in a contract only when it has been accepted, according to its terms, and without substantial change, either by word or act, for without such an acceptance there cannot be agreement, which is an essential element and consists in the parties being of the same mind and intention concerning the subject-matter of the contract. 9 Cyc., 244, 254. In this case the evidence, which we must consider as true in dealing with a nonsuit, shows a definite offer to sell cotton yarns, manufactured by the defendant at its mill, of a certain quality or grade, designated by numbers, and for a certain or fixed price. This offer was well understood by the parties, who had been in communication before in regard to it by the use of the telephone. There is no dispute, though, as to what were the terms and meaning of the offer, the controversy being restricted to the meaning of the telegram of acceptance. We are of the opinion that there should be no difficulty in determining this question. The acceptance is so plain and simple in its wording that the meaning cannot be misunderstood, and this is true without regard to its lack of punctuation. It informed the defendant that its telegram had been received, and that its offer was accepted. The defendant's message, when received by the plaintiff, disclosed the terms

of a definite and distinct offer to sell the yarns at a certain price, and the words, "Accept offer," could convey but one meaning, which is, that the offer was accepted as it had been made by the defendant. And it was an absolute acceptance, without any condition or qualification. What follows the acceptance are not words of condition or qualification, and was not intended to vary the terms of the offer. The bargain to take the 10,000 pounds of 20's and 24's at the price named in the offer was defendant could furnish yarns known as 16's and 18's, and was entirely to the defendant. The remaining words were intended, not to change this contract, but to make a new and additional offer by the plaintiff to defendant as to increasing the quality to 25,000 pounds in the event defendant could furnish yarns known as 16's and 18's, and was entirely independent of the acceptance of the offer. This, we think, is clear, and it makes no difference in the conclusion whether we read plaintiff's telegram of 17 October, 1916, in reply to the one from the defendant, with or without punctuation, for the language, when naturally construed, divides the message of the plaintiff into three distinct sentences—the first, as to the receipt of the plaintiff's telegram; the second, as to the acceptance of the offer; and the third, as to the increase in quantity. But, viewing the words in another way, we reach the same conclusion, for if we take the meaning to be that the plaintiff accepted the offer, unless the defendant could furnish 16's and 18's, when the quantity could be increased to 25,000 pounds, now as this could not be done, it left the accepted offer intact. But the language is not as strong as this, and, as we find it, admits of but one construction. The defendant so understood the true meaning of the telegram, as appears from its own interpretation of it. In its telegram in reply it says: "Cannot increase *order*, as we do not make numbers below 20." This means, without doubt, that defendant treated the acceptance as forming an independent contract, and that what followed was a new offer by the plaintiff for more yarns of a different kind.

That the last words do not qualify the acceptance of the offer, so as to contravene the rule that it must be in accordance with the terms of the order, is well settled by the highest authority. "If an offer is accepted as made, the acceptance is not conditional and does not vary from the offer, because of inquiries whether the offerer will change his terms, or as to future acts, or the expression of a hope, or suggestion," etc. 9 Cyc., 269, citing authorities. "An inquiry as to whether the offerer will modify the terms of the offer is not a rejection; or if, after acceptance, the acceptor insists on a modification of the original contract, in which the offerer does not acquiesce, such insistence cannot avoid the contract. Hence the acceptor can subsequently enforce the original contract in the absence of facts to create an estoppel." 1 Paige on Contracts (1905),

sec. 46, p. 80. The following, taken from a decided case, is closely applicable: "The guardian's acceptance of the defendant's offer was absolute and unconditional. It is not in any legal sense qualified by the expression of his hopes as to what the defendant would have done, or what he would like to have him do if the hay when hauled proved good enough. Aside from all this, the defendant was told that he could take the hay at his own offer. It seems to have been the intention and understanding of both parties that the property should pass." *Phillips, by his guardian, v. Moor,* 71 Me., 78. In *Gulton v. Gilchrist,* 92 Iowa, 718, where defendant accepted the offer of a lease for five years at $200 per year, adding that he would like to build a cookroom, with privilege to remove it, it was held that the offer had been accepted absolutely, and the reference to the cookroom did not vary the terms of the offer. The Court, in *Brown v. Cairns,* 63 Kansas, 693, ruled the same way in respect to a contract of lease similarly worded, holding that the additional words as to a reduction of the rent did not have the legal effect of making the acceptance of the offer conditional. The case of *Stevenson v. McLean,* 5 L. R., Q. B. Div. (1879-'80), p. 346, is, in principle, much like our case, but it will be found upon examination of the above case that there is less reason here for holding that the words added to the plaintiff's acceptance of the defendant's offer either constituted a rejection of it or made it conditional, than there was in the cases just cited by us, for in this instance there was an absolute acceptance of the defendant's offer and a new offer by plaintiff as to other yarns.

It is said in 6 Ruling Cas. Law, p. 605, par. 27: "A request, suggestion, or proposal of alteration or modification, made after an unconditional acceptance of an offer, and not assented to by the opposite party, does not affect the contract in force and effect by the acceptance." But the case of *Turner v. McCormick,* 56 W. Va., 161 (107 A. S. Rep., 904; 67 L. R. A., 853), is more directly in point, and in the opinion of the Court, by *Judge Poffenbarger,* there is an able and exhaustive treatment of the subject, with full citation and review of the cases bearing upon it. The Court there held:

"1. An acceptance in writing of a formal and carefully prepared option of sale of land, within the time allowed by it for acceptance, using the formal words, 'according to terms of the option given me,' to which there is added, by the conjunction 'and,' a request for a departure from its terms as to the time and place of performance, is unconditional, and converts the option into an executory contract of sale.

"2. A mere request by one of the parties thereto for an alteration or modification of a fully accepted proposed contract, which by acceptance has been wrought into a binding contract, is not a breach thereof, giving right of rescission thereof or action thereon. Neither does it effect such alteration, unless assented to by the other party.

"3. Such request relates to performance of the contract, and is not an element in the making thereof, although written and connected as aforesaid, with the acceptance, on a single sheet of paper, so as to make of the acceptance and request a compound sentence."

In discussing the question whether there is any difference in legal effect between a new proposal, if contained in the paper accepting the offer, which is our case, and one if in a separate writing, the learned judge said: "A request may be added to an acceptance for a good purpose, and it does not necessarily indicate an intention to change the terms of the proposed contract. The plaintiff desired the land, and was willing to take it and pay for it. He preferred to close all the options on the same day, and therefore added this request. Suppose he had on one day put the first part of the notice in writing and sent it to the defendant. That would have closed the contract, undoubtedly. Then suppose, on the next day he had written a request that the performance be delayed until 28 June. That would not have been a repudiation of the contract. It would have been a mere request for an extension of time. The defendant could not have treated the contract as broken for that reason. He could have enforced it, notwithstanding this request. The mere fact that the acceptance and the request are in juxtaposition, standing in the same sentence, united by a conjunction, does not change their character or legal sense." We repeat that the facts in this case are stronger in favor of the plaintiff than were those in the cases cited in favor of the party who accepted the offer, for the language here clearly imports an intention to accept absolutely, and, in addition and without any alteration of the acceptance in the least, to make another offer or proposal to buy other yarns, and the defendant so regarded it, as in his last message he refers to the acceptance as constituting an order for the 10,000 pounds of yarns.

The second position of the defendant is equally untenable. If there is sufficient evidence to show a custom to follow up the telegraphic acceptance with a confirmatory letter, it was intended, of course, merely as a precautionary measure to provide against a possible mistake in transmission by the electric telegraph. We do not understand the evidence to be as the defendant construes it. When the plaintiff testified that "This is the invariable custom of companies manufacturing yarns," which immediately follows his allusion to the one instance where he failed to mail such a letter, when the defendant requested such a letter and it was sent at its request, he was evidently referring to the custom of the defendant, when there had been such an omission on the part of its customer, to call attention to it and request that the letter be sent. If he had been referring to a custom of the customer to follow the acceptance with a confirmatory letter, he would not have used the words,

the "custom of companies." This, we think, is the natural and reasonable construction as the record now stands. There may have been ellipses, but this does not appear. "If the acceptance is complete, a request that a formal contract be drawn up embodying the terms of the agreement is immaterial." 9 Cyc., 291. The object of such a custom, if it existed, was to avoid any mistake in the terms of the contract, and not for the purpose of finally settling the terms by a formal writing. This is the clear distinction as we understand it. 9 Cyc., 280. In the case at bar the terms of the contract are not the subject of dispute, but only their meaning.

A similar question was presented recently in *Billings v. Wilby*, 175 N. C., 571, where the parties had been negotiating about a contract, and finally agreed on the terms, but plaintiff wired his acceptance, as follows: "Night letter received. Will accept. Send contract signed at once." And it was held that the words, "Send contract signed at once," did not prevent the completion of the contract by the formal acceptance in the same message. *Justice Hoke* said, when referring to the final words of the message of acceptance: "This, by correct interpretation, meaning merely that it was the desire and preference of the plaintiff that the agreement they had made should be written out and formally signed by the parties, and it is the recognized position here and elsewhere that, when the parties have entered into a valid and binding agreement, the contract will not be avoided because of their intent and purpose to have the same more formally drawn up and executed, and which purpose was not carried out," citing *Gooding v. Moore*, 150 N. C., 195; *Teal v. Templeton*, 149 N. C., 32; *Sanders v. Pottlizer Bros. Trust Co.*, 144 N. Y., 209; Clark on Contracts (2 Ed.), 29, and authorities cited. But the principle is stated with more direct reference to the facts of our case in *Gooding v. Moore, supra*, where we held: "When the parties to an oral contract contemplate a subsequent reducing it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding upon them, though their intent to formally express the agreement in writing was never effectuated."

Our conclusion is that the case falls easily within the principle stated in the books regarding the legal effect of such transaction, viz.: "The acceptance of an offer must be absolute and identical with the terms of the offer; or, as it has been expressed, 'an acceptance, to be good, must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand. Unless this is so, there is no meeting of minds and expression of one and the same common intention -the intention expressed by one of the parties is either doubtful in itself or is different from that of the other. The intention

of the parties must be distinct and common to both.'" Clark on Contracts (2 Ed.), pp. 27 and 28. "An acceptance by promise or act, and communication thereof when necessary, while an offer of a promise is in force, changes the character of the offer. It supplies the elements of agreement and consideration, changing the offer into a binding promise, and the offer cannot afterwards be revoked without the acceptor's consent. Where the agreement is complete by acceptance, a new proposal to modify it by either party has no effect on the agreement unless it is accepted and thus becomes a new substituted agreement." 9 Cyc., pp. 283, 284.

The correspondence took place about the middle of October, 1916, and defendant complains that the plaintiff did not insist upon performance of the contract to deliver 10,000 pounds, nor refer to the matter after its last message until 1 December, 1916; but in this connection it appears that a contract for yarns was then pending between the parties and in the course of performance, and the new contract was not to be performed until the completion of the deliveries under the pending agreement, which took place the first of December, when plaintiff called for the deliveries under the contract of October. This fully explains the delay, and further manifests plaintiff's clear understanding of the agreement. It may further be said that plaintiff wrote to the defendant about the first and on 16 December, asking for the shipment of the yarns, and received no reply to either letter, and received none at all until his third letter was mailed the last of the month. Why the defendant was thus silent is not explained by the evidence, though the market price of cotton was rising all the time, as it appears. It is strange that defendant said nothing when urged to fill the contract, if it was not liable on the contract. The natural impulse would have been to deny at once that the contract was ever made.

This expression in plaintiff's telegram of 17 October, 1916, "Wire immediately," referred clearly to his new and independent offer to buy more yarns of a different number, if defendant had them for sale.

The contract was clearly expressed, and was consummated by the acceptance of plaintiff, and not affected by the new proposal, which was added to it.

Judgment will therefore be entered below for the plaintiff according to the stipulation of the parties appearing in the record, unless there is meanwhile an adjustment between them as to debt and costs.

Reversed.

W. H. AND L. B. JENNETTE, TRADING AS JENNETTE BROS. CO., v. ELISHA COPPERSMITH AND WIFE, ATTIE.

(Filed 18 September, 1918.)

1. Statutes, Penal —Interpretation—Partnership—"Assumed Name."

Section 1, chapter 77, Laws of 1913, prohibiting, in general terms, the conducting, carrying on, or transacting a business in this State under an assumed name, without filing a certificate with the clerk of the court of the county, showing the name of the owner, making the forbidden act a misdemeanor, is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision.

2. Statutes—Partnership—"Assumed Name"—Contracts, Illegal.

Where a partnership is conducted under an "assumed name," without having complied with the requirements of section 1, chapter 77, Laws 1913, in having filed the certificate with the clerk of the court of the county, its contracts are not enforcible in the courts of this State.

3. Statutes—Partnership—"Assumed Name"—Interpretation—Surname.

Where brothers are engaged in business under the name of Jennette Brothers Company, the word "company" may be taken to denote a partnership, and will not come within the provision of the statute requiring that a business conducted under an "assumed name" must be registered with the clerk of the Superior Court of the proper county, showing the business name of the owner; the words, "assumed name," meaning a fictitious name and not applying when the true surname of the partners are correctly given, and afford a reasonable and sufficient guide to correct knowledge of the individuals composing the firm.

ACTION tried before *Bond, J.*, and a jury, at January Term, 1918, of PASQUOTANK.

The relevant facts are stated in the case on appeal, as follows:

The plaintiffs, W. H. Jennette and L. B. Jennette, are brothers and partners, trading as Jennette Brothers Company, and are residents of Pasquotank County, North Carolina.

During the year 1914 one W. B. Halstead, a farmer, went to plaintiffs and requested them to furnish him with guano and fertilizers to go under his crop, at which time plaintiffs learned that defendants had a mortgage on the personal property and crops of said Halstead, and, knowing this, the plaintiffs refused to furnish said Halstead with guano and fertilizers unless the defendants would release the said Halstead from the operation of the mortgage they had against him, or at least consent and allow the plaintiffs' mortgage to come in ahead of the defendants in this cause.

After the plaintiffs refused to furnish the said Halstead with guano and fertilizers, the defendants released, in writing, their mortgage from operating ahead of the plaintiffs' mortgage on the property of the said Halstead, and particularly did the defendants write plaintiffs that they

would let plaintiffs come in ahead of their mortgage if they would furnish said Halstead with guano and fertilizers. The paper-writing was, in words and figures, as follows:

MESSRS. JENNETTE BROS. COMPANY.

DEAR SIRS:—You can let Mr. W. B. Halstead have what guano he wants, and we will let you come in ahead of our mortgage.

28 March, 1914. E. COPPERSMITH.

It was admitted that E. Coppersmith signed this for his wife, Attie, and himself. Whereupon plaintiffs furnished, on 1 April, 1914, the said Halstead with guano and fertilizers to the amount of $116.50 and took a mortgage on the personal property and crops of said Halstead, which was the identical property covered by the defendants' mortgage.

Plaintiffs would not have furnished said Halstead with guano and fertilizers if defendant had not allowed the mortgage of the plaintiffs to come in as a prior lien to the mortgage of the defendants, and, by reason of the defendants allowing plaintiffs to come in ahead of their mortgage, the plaintiffs were induced to furnish and did furnish the said Halstead with fertilizers.

Subsequent to plaintiffs taking their mortgage on the personal crops of the said Halstead, which was the identical property covered by the defendants' mortgage, on or about 6 January, 1916, the defendants took the said personal property of the said Halstead and sold the same at their residence and converted the proceeds of said sale to their own use, and have never turned over any of the proceeds or any of the property to the plaintiffs.

Halstead has never paid to the plaintiffs any part of the note secured by the mortgage, nor has the defendant paid any part of the proceeds of said sale or turned any of the property over to the plaintiffs. Demand has been made by the plaintiffs, both on Halstead and the defendants, for the property or payment for the same.

(It was admitted that the property sold by the defendants was of sufficient value to equal the principal and interest claimed by the plaintiffs to be due them for guano furnished to said Halstead.)

It was also in evidence that plaintiffs were not registered as a partnership, under chapter 77, Public Laws 1913, until after commencement of this action.

When plaintiffs rested their case the defendants moved for judgment as of nonsuit. Motion denied, and defendants excepted.

Verdict and judgment for plaintiff, and defendant excepted and appealed, assigning for error the failure of plaintiffs to properly register their trade name, as required by chapter 77, Laws 1913.

Ehringhaus & Small for plaintiff.
Ernest L. Sawyer for defendant.

HOKE, J. Section 1, chapter 77, Laws 1913, in general terms, prohibits the conducting, carrying on, or transacting a business in the State under an assumed name, etc., without filing a certificate with the clerk of the court in the county or counties where such business, etc., is to be carried on, showing the business name of the owner, etc., and in a subsequent section of the statute the forbidden act is made a misdemeanor. In *Courtney v. Parker,* 173 N. C., 479, it was held that contracts made, etc., in the case of a business conducted in violation of the statute, could not be enforced in the courts. While the court felt constrained to give this construction, on the ground, chiefly, that the act was a police regulation designed and intended to protect the general public from fraud and imposition, under such an interpretation the act is of such a highly penal character that it should not be extended or held to include cases that do not come clearly within its provision. A recognized meaning of the word "assume" gives the impress of an act calculated to mislead or baffle inquiry. In the Century Dictionary the sixth definition is given as follows: "To take fictitiously; pretend to possess, as to assume the garb of humility," citing Hamlet's injunction to the queen: "Assume a virtue if you have it not." Act III, Scene 4. And the whole scope and purpose of the act shows that the word was used in this sense. The term "company" is not an infrequent nor an inapt word to denote a partnership. *Clark v. Jones & Bro.,* 87 Alabama, 474; 1 Words and Phrases (Second Series), 745. And the title of plaintiffs' firm, Jennette Bros., Company, being a partnership conducted under that name and style, giving as it did the true surname of its members, affording a reasonable and sufficient guide to correct knowledge of the individuals composing the firm, should not be considered an "assumed" name, within the meaning and purpose of the law.

We are of opinion that the cause has been properly decided, and the judgment for plaintiff is affirmed.

No error.

IN RE WILL OF GEORGE V. CREDLE. GEORGE T. CREDLE, CAVEATOR.

(Filed 18 September, 1918.)

1. Wills — Execution — Admissions—Mental Incapacity—Undue Influence—Burden of Proof.

Upon proceedings to *caveat* a will, the burden of proof as to mental incapacity and undue influence is upon the *caveator* when he admits that the paper-writing was duly and formally executed by the testator therein.

2. Wills—Insanity — Presumptions—Mental Disturbances—Evidence—Burden of Proof.

The presumption of the continued mental incapacity of the testator to make his will, when mental derangement has been shown a short time prior to its execution, applies to cases of general or habitual insanity, and not to those of intermittent and occasional mental disturbances, which, under the circumstances of this case, are held to be too indefinite and lacking in directness to place the burden of proof on the propounders and take the case to the jury.

Issue of *devisavit vel non,* tried before *Bond, J.,* at July Term, 1918, of Hyde.

These are the issues:

1. Were the paper-writings propounded as the last will and testament of George V. Credle and codicil thereto, written, signed, witnessed, and executed in accordance with the formalities required by law for execution of a valid last will and testament and codicil to same? Answer: Yes.

2. At the time of execution of said paper-writings, did said George V. Credle have sufficient mental capacity to make and execute a valid will and codicil to same? Answer: Yes.

3. Was the execution of either of said paper-writings procured by undue influence? Answer: No.

4. Is said paper-writing and said codicil propounded and every part of both the last will and testament and codicil to same of said George V. Credle? Answer: Yes.

The answer to the first issue was agreed to, and the court charged the jury that there was not sufficient evidence upon the second and third issues to warrant a finding for the *caveator.* The latter excepted and appealed.

Ward & Grimes for propounders.
Spencer & Spencer and H. C. Carter, Jr., for caveator.

Brown, J. The execution of the will being admitted, the court placed the burden of proof upon the second and third issues upon *caveator,* and charged the jury as recited. The only assignment of error is directed to the sufficiency of the evidence.

We agree with the learned judge that the evidence of incapacity is too indefinite and too lacking in directness to justify a verdict upon the second issue, and there is absolutely no evidence of undue influence.

The rule that when insanity is proved to have existed at any particular time, it is to be presumed to continue, applies only to cases of general or habitual insanity. Therefore, where a general mental derangement or lunacy is shown to have existed not very long prior to the execution

of a will, the burden of proof as to the sanity of the testator is thrown upon the propounder to show that when the will was executed the testator was of sound mind. *Hudson v. Hudson,* 144 N. C., 449; *Ballew v. Clark,* 24 N. C., 23.

But no presumption of continued insanity arises from intermittent and occasional mental disturbance of a temporary character. *S. v. Sewell,* 48 N. C., 245. The evidence in this case discloses nothing more than an occasional mental disturbance. We think the *caveator* has failed to offer sufficient evidence to justify the jury in finding that when he executed the will, on 24 February, 1905, the testator was *non compos mentis.*

No error.

C. G. HOLLAND, RECEIVER, v. EDGECOMBE BENEVOLENT ASSOCIATION.

(Filed 18 September, 1918.)

1. **Judgments — Excusable Neglect — Attorney and Client — Neglect of Attorney.**

   A client will be relieved against a judgment by default taken against him through the negligence of his attorney.

2. **Same—Neglect of Client.**

   A physician, the president of a corporation and having in charge an action against it, spoke to an attorney about representing the corporation and understood that he had undertaken to do so, contrary to the understanding of the attorney. At a term of the court when the attorney was sick in a hospital, under the physician's care, a judgment by default was taken against the corporation: *Held,* it was the duty of the physician, as president of the corporation, to question the attorney, and his neglect in not looking after the case and employing other counsel was not excusable.

MOTION to set aside judgment, heard before *Daniels, J.,* at April Term, 1918, of EDGECOMBE.

Motion denied. Defendant appealed.

J. M. Norfleet for plaintiff.
Don Gilliam for defendant.

BROWN, J. The facts found by the judge show that Dr. J. M. Baker was president of defendant corporation; that judgment was regularly taken against defendant by default at the close of March Term, 1918; that the said president had charge of the defense of the action, and in apt time undertook to employ Donnell Gilliam, Esq., as attorney, residing in Tarboro, to defend the action. According to the findings, there is a dispute as to whether he actually employed said attorney. Dr. Baker

thought he had employed Mr. Gilliam, but the latter did not so understand it. It is needless to consider that phase of the case.

The court finds that Dr. Baker and Mr. Gilliam lived in Tarboro, and that, a few days before the court convened, Mr. Gilliam was confined in the hospital in said town, under the care of Dr. Baker and until several days after the adjournment of court, and that there was no conversation between them while he was in the hospital about the case until after the judgment had been rendered and the court had adjourned, when Dr. Baker learned from Gilliam that he had not considered himself employed.

We have consistently held that where the negligence is that of the attorney, and not of the client against whom a judgment by default is rendered, relief will be afforded the latter. Clark's Code, sec. 274, and cases cited; *Ellington v. Wicker,* 87 N. C., 14.

There was a misunderstanding as to whether the president of defendant, who had charge of this matter, had employed counsel. But however that may be, it is certain that the attorney was confined to his bed in Dr. Baker's hospital, before, during, and after the March Term of Edgecombe Court. The client, therefore, knew the attorney could not give the case his personal attention.

It was the client's duty to question the attorney in reference to the matter if he thought he had employed him, and while the attorney was ill under his care. Under such conditions it was such negligence upon the part of the client not to look after the case and to employ other counsel that the law does not excuse him. *Cohoon v. Brinkley,* this term.

Affirmed.

NORFOLK BUILDING SUPPLIES COMPANY v. ELIZABETH CITY HOSPITAL COMPANY.

(Filed 18 September, 1918.)

1. Mechanics' Liens — Laborers — Materialmen—Notice—Liens—Statutes—Trust Funds.

Under the provisions of Revisal, sec. 2021, requiring the contractor to furnish the owner an itemized statement of amounts due by him to laborers, materialmen, etc., which the owner must retain from the amount he owes him, providing also that the laborers and materialmen may themselves give such notice with the same results, thereby securing their "liens and benefits," etc., it is *Held,* that the liens thereby conferred will arise to the claimants for labor done or material furnished, etc., upon sufficient notices properly served, either by the contractor or claimants; and the amounts due by the owner to the contractor at the time of such notice, or which may thereafter be earned under the terms and provisions of the contract, shall constitute a trust fund to be distributed among the lienors.

2. Mechanics' Liens—Laborers—Materialmen—Notice—Liens—Architects.

Notices of claims by laborers, materialmen, etc., for liens upon the building, given to the owner's architect, do not meet the requirements of the statute, without evidence of his further agency, and is insufficient. Rev., sec. 2021.

3. Same—Amounts Due.

The object of the notice required by the statute to be given the owner, and upon which the statutory lien for labor, material, etc., depends, is to apprize the owner of the amounts then due to those who have done labor upon or furnished materials for the building; and a statement of the materials used in the building, given by the contractor to the architect, upon which the former is to be allowed a payment of a certain per cent under the terms of contract, as the building progresses, does not meet the statutory requirements, and is insufficient to create the lien.

4. Mechanics' Liens — Laborers — Materialmen — Owner's Knowledge—Notice—Statutes.

Mere knowledge of the owner that certain laborers are at work on his building, or that certain persons or firms have supplied materials, is insufficient as notice to him, under the statute, of any claim of lien thereon. Rev., sec. 202.

ACTION to enforce a materialman's lien, under section 2021, *et seq.*, of Revisal, tried before *Wheedbee, J.*, and a jury, at Special Term, 1918, of PASQUOTANK.

On a former trial of the case a judgment of nonsuit was entered, the judge below holding that none of the notices relied upon by plaintiff to effect a lien, as claimed by him, was sufficient for the purpose. On appeal from that judgment, the same was reversed, this "Court being of opinion that at least one of the notices—that of 18 January, 1915—was sufficient in form to constitute a lien, requiring a *pro rata* distribution of the amount due to the contractor at that date." See 174 N. C., 57.

This opinion having been certified down, the present trial was entered upon, and, defendant having admitted the service of notice of 18 January, there was verdict to the effect that at date of said notice there was due from the owner to the contractor the sum of $1,000, and that $268.71 of this sum, the *pro rata* due plaintiff on his claim, has been paid him, and judgment was thereupon entered that defendant go without day and recover his costs.

Plaintiff, having duly excepted, appealed.

Ehringhaus & Small for plaintiffs.
Meekins & McMullan and C. E. Thompson for defendants.

HOKE, J. Under section 2021, Revisal, and affiliated sections, a contractor is required to furnish the owner of the building, etc., an itemized statement of the amount due to any laborer, mechanic, materialman, etc.,

and the owner must thereupon retain from the amount due to such contractor a sufficient sum to pay same; and in the same section it is provided that any laborer, mechanic, artisan, or person furnishing material, etc., may themselves serve such a notice on the owner or agent, and thereby secure the "lien and benefits conferred by this section or by any other law of this State in as full and ample a manner as though the contractor had furnished the statement."

Construing these sections, it has been held in several of our decisions that the liens thereby conferred will arise to these claimants by sufficient notices, properly served, either by the contractor or claimants, and that the amounts due from the owner to the contractor at the time of notice duly served, or which may thereafter be earned under the terms and provisions of the contract, shall constitute a trust fund and to be distributed *pro rata* among the claimants, whose demands shall be presented properly and in apt time. *Foundry Co. v. Aluminum Co.*, 172 N. C., 704; *Brick and Tile Co. v. Pulley-King Lumber Co.*, 168 N. C., 371; *Manufacturing Co. v. Andrews*, 165 N. C., 285; *Clark v. Edwards*, 119 N. C., 115; *Pinkston v. Young*, 104 N. C., 102; *McCracken v. Gain*, 128 Ill., 23. In *Foundry Co. v. Aluminum Co., supra*, it was held: "The amount due the contractor and subject to the claims of materialmen who have filed their statutory notice is not a debt due by owner to the materialmen in the ordinary sense, but a fund held in trust for them strictly arising from the operation of the statute, in conformity with its terms; and the statute imposes no duty upon the owner when the materialmen have not filed the required notice or acquired their lien accordingly."

In *Brick Co. v. Pulley* the Court said: "One who has furnished material used in the construction of the building under contract with the subcontractor, by giving the proper notice to the owner, is substituted to the rights of the contractor, and his lien is enforcible against any and all sums which may be due from the owner to him at the time of notice given, or which are subsequently earned under the terms and conditions of the contract. Revisal, secs. 2019, 2020, 2021."

And in regard to the *lien* arising from the contractor's giving the proper notice, it was said, in *Pinkston v. Young:* "If the contractor shall furnish the itemized statement, the laborers' lien will arise and be effectual as prescribed." And to the same effect is *Butler, etc., v. Gain*, 128 Ill., 23, *supra.*

Considering the record in view of the principles approved in these and other like decisions, the jury having found that plaintiff gave proper notice of their claim 18 January, 1915; that there was then due the insolvent contractor the sum of $1,000, and that plaintiff has received his *pro rata* of this sum, the judgment for defendant must be upheld,

unless some error has been shown in the proceedings by which this verdict was reached.

It is chiefly urged for the plaintiff that there was an earlier notice served when there was a much larger amount due, to wit, the monthly notices given by the contractor, October, etc., 1914, to the architect in charge of the building and while it was being constructed, and which contained a statement of the portion of material which had been purchased from the plaintiff.

There are cases to the effect that, under statutes similar to ours which authorize notices to the owner or his agent, a notice to an architect, as such, is not regarded as sufficient. *Drummond v. Rice*, 27 Pa. Sup. Ct., 226; *Tangenheim v. Anschutz-Bradberry Co.*, 2 Pa. Sup. Ct., 285. But if it be conceded that the testimony in this case shows such extended powers in the architect as to constitute him a proper agent for the purpose, within the meaning of the statute, this position of plaintiff must be disallowed, for the reason that the notices relied on do not comply with or serve the purpose of the statutory requirement. They were notices which the architect was required to give to enable him to draw the 90 per cent of the amount to be paid him by the terms of the contract, and were not designed nor framed to notify the owner of any materialman's lien. True, under our construction, the lien will arise to the claimant, whether the statutory notice is given by the contractor or the party, but its purpose is to apprize the owner that the itemized amount was due the claimant for material or labor used in the building.

Under the terms of the statute, the contractor must notify the owner by a statement, properly itemized, showing the amount owing to the materialman. And the notice of the materialman, etc., must be an itemized statement of the amount due him; and a mere notice by the contractor to procure his amount per cent by making a satisfactory showing of the amount of material delivered, without also showing that same is due to the claimants, is no compliance with the statute, and creates no lien for the materials.

Mere knowledge on the part of the owner that certain laborers are at work on the building, or that certain persons or firms have supplied material, does not suffice. *Clark v. Edwards, supra.*

The suggestion that, in a settlement had between the owner and the contractor after notice given, an additional credit was allowed, is without merit. As we interpret the evidence on this question, it merely means that in such settlement the contractor ascertained that the credit in question, amount $477, had been paid out for material before any valid notice filed, and that such credit should have been and was properly allowed.

We find no error in the record, and the judgment for defendant must be affirmed.

No error.

E. M. SCHEFLOW v. J. W. PIERCE ET ALS.

(Filed 18 September, 1918.)

Mechanics' Liens—Principal and Surety—Contracts—Beneficiaries—Laborers — Subcontractors — Statutes — Municipal Corporations—Cities and Towns.

Where a town has contracted for sewerage to be done upon its streets, the contractor to pay the laborers and materialmen, with provision for a surety bond for the faithful performance of the contract, including the payment for the labor and materials, etc., and the bond has been given for its faithful performance by the contractor, a subcontractor for the excavation of the trenches with his own machine, for which he furnishes his own oil, etc., at an agreed price per foot, is a laborer and has a lien for work and labor done, within the meaning of the contract and of the statute, and may recover a balance of the contract price upon the bond as a beneficiary thereunder, though not a party thereto or entitled to a lien against the town. Chapter 150, Laws 1913, amended by chapter 9, Extra Session 1913, and chapter 191, Laws 1915. Revisal, secs. 2016, 2019.

APPEAL by plaintiff from *Daniels, J.*, at April Term, 1918, of EDGECOMBE.

This is an action against the defendant Pierce, the town of Tarboro, and the National Surety Company as the surety for the faithful performance of the contract by the defendant Pierce to do certain sewerage work and pipe-laying in the streets of said town. Soon after the execution of said contract and the bond of the surety, the plaintiff and said Pierce entered into a contract by which the plaintiff was to excavate the sewer trenches, using a trench machine for that purpose, with a competent operator on it, furnishing the fuel, oil, and repairs, and operating the machine to do the work. The plaintiff was to receive for said work a stated sum per foot, according to the depth of the trenches cut.

The plaintiff began work under his contract and cut a great number of trenches of varying depths. That the balance due him for the work done on the contract is $1,350.85 is not disputed. The defendant Pierce failed to pay this balance, alleging that he is financially unable, and the town of Tarboro and the National Surety Company base their refusal upon the ground that they are not liable therefor and that the bond executed by the surety company does not cover the plaintiff's claim. The defendant Pierce failed to answer, and judgment by default final was entered against him. The town and the surety company demurred. The court, it seems, overruled the demurrer as to the plaintiff's right to maintain the action direct on the bond, but sustained the demurrer that the plaintiff's claim was not covered by the bond, and the plaintiff appealed.

Alsbrook & Phillips for plaintiff.
Bryant & Brogden and Don Gilliam for defendants.

CLARK, C. J. It would seem that the court overruled the demurrer as to the ground that plaintiff could not maintain this action, and the defendants are not appealing. In a case almost exactly like this it was held that "The beneficiaries of the contract, though not a party or privy thereto, may maintain an action thereon." *Gastonia v. Engineering Co.,* 131 N. C., 363, citing numerous authorities. In that case, "though no mechanic's lien could be filed against the town" (p. 365), on page 366 the Court said: "Those claimants (materialmen and laborers), being the beneficiaries of the contract, could have brought their separate actions on said contract against the engineering company and its surety," etc., citing *Gorrell v. Water Co.,* 124 N. C., 328; *Shoaf v. Ins. Co.,* 127 N. C., 308.

In *Supply Co. v. Lumber Co.,* 160 N. C., 428, the rule is thus stated: "The beneficiaries of an indemnity contract ordinarily can recover, though not named therein, when it appears by express stipulation or by reasonable intendment that their rights and interests were contemplated and being provided for." In this case (*Supply Co. v. Lumber Co.*) it is stated on page 431 (about middle): "In the case before us it appears that the contractor had agreed to pay for all labor and material supplied for the erection of the building, and to save the trustees of the church harmless from any and all claims and liens which might arise out of contracts made by him for material furnished, laborers, etc., with the stipulation that said contractor shall faithfully perform and carry out said contract according to the true intent and meaning thereof. These provisions, in our opinion, clearly contemplate that the contractor shall pay the materialmen and laborers and constitute such claimants the beneficiaries of the contract and bond within the principles of the authorities cited. *Clark v. Bonsal,* 157 N. C., 270, and *Peacock v. Williams,* 98 N. C., 324, are distinguished, for in those cases the contract and bond did not provide or intend to benefit third parties."

Our decision in *Gorrell v. Water Co.,* 124 N. C., 328, that the beneficiary in a contract can maintain an action thereon has been reaffirmed in numerous cases cited in the Anno. Ed. besides *Gastonia v. Engineering Co.,* 131 N. C., 363, and *Supply Co. v. Lumber Co.,* 160 N. C., 428. Besides, it has now been made statutory by chapter 150, Laws 1913, amended by chapter 9, Extra Session 1913, and chapter 191, Laws 1915, which provides that the town shall require the contractor for work on its buildings, roads and streets to give a bond conditioned for the payment of *all labor done* on, and material and supplies furnished for, the said work, and further provides: "Any laborer doing work on said building and materialmen furnishing material therefor and used therein shall have the right to sue on said bond, the principal and sureties thereof in the courts of this State having jurisdiction of the amount of

said bond, and any number of laborers or materialmen whose claims are unpaid for *work done* and material furnished in said building shall have the right to join in one suit upon said bond for the recovery of the amount due them respectively."

The contract of the defendant Pierce stipulates (section 17) that he will give a surety bond "conditioned to secure the *faithful performance of this contract,* the payment for all materials purchased and used under this contract, the payment of wages of laborers employed by said contractor on the works, and *the liens which may arise* therefrom." Said contractor subsequently made the contract with the plaintiff as a subcontractor, and the bond of the surety stipulates that Pierce, the contractor, "shall in all things stand to and abide by, and well and truly observe, do, keep, and perform all and singular the terms, covenants, conditions and agreements in said contract, on his part." Revisal, 2019, gives to all subcontractors and laborers a lien for "labor done or material furnished, which lien shall be preferred to the mechanic's lien now provided by law."

As is said in *Gastonia v. Engineering Co.,* 131 N. C., 365, 366, as quoted *supra,* "Though no mechanic's lien can be filed against the town," the beneficiaries, *i. e.,* the materialmen and laborers, under Revisal, 2016, can none the less bring their action as the beneficiaries of the contract of suretyship, and for a stronger reason the subcontractors, under Revisal, 2019, can do the same for *"such labor done* or material furnished," since such lien "shall be preferred to the mechanic's lien."

Though no lien can be filed against the town of Tarboro, it would be liable, under Rev., 2016, to laborers and materialmen, and, under Rev., 2019, for labor done and material furnished to the extent of any balance due the contractor and unpaid at the time of the notice. The city, in its contract with Pierce, required him to give the bond for compliance with his contract *in all respects,* which, of course, included laborers and material, and supplies, under Rev., 2016, and what shall be due the subcontractors for work and labor done (Rev., 2019).

The first clause in the contract with Pierce is, that he should "furnish, *at his own expense,* all the material, labor, and equipment necessary to do the work." He furnished the same, but not at his own expense, for a great part of the labor done on the job is yet unpaid for, including this plaintiff, and the condition of the bond is broken. It would be strange if the plaintiff, who did practically all the work on the job, should not have recourse to the bond for the amount due him, solely because he did the work with a machine instead of with his own hands or by hiring laborers to work with their hands.

The defendant surety company cites cases such as *Boiler Works v. Surety Co.,* 43 L. R. A. (N. S.), 162, where it was held that a subcon-

tractor could not file a claim for the repairs on a steam shovel which had been used by him. Also, *Public Works Co. v. Yonkers,* 207 N. Y., 81, which held that the contractor could not recover against the bonding company for the rent of a steam shovel because that was not labor or material. To the like effect is *Surety Co. v. Des Moines,* 152 Iowa, 531, where the Court held that the contractor could not recover for lanterns, sledges, chisels, and axles, and the like, used in the work.

Lohman v. Peterson, 87 Wis., 287, held that the rent of oxen hired to the contractor to haul ties was not a lien on the ties, and there are many other cases to like effect. The reason for this is, that these were merely instrumentalities used by the contractor or subcontractor to do the work. They were not labor, and they were not materials; but here the contract was to do so much trenching at a fixed price, and turn it over free of liens for labor done or material furnished. The plaintiff is not suing for rent paid (if any) by him for the use of his machine, nor for any repairs put thereon, nor for the use of his machine, nor is he suing for his wages in supervising the work, as in *Whitaker v. Smith,* 81 N. C., 340, where this Court held that an overseer could not file a lien for labor. Nor could he recover for oil or fuel used by him in operating his machine.

This plaintiff's claim is simply for the work and labor done, as subcontractor, at the stipulated rate. It is admitted by the demurrer, of course, that the balance due him by the contractor is the amount alleged, for which the plaintiff has obtained judgment against said contractor in this action.

The contract of Pierce with the city being to do that very work, and the contract with the surety company being that he shall faithfully perform all the provisions of his contract, which includes this very trenching which the plaintiff has done, and which said Pierce contracted to "furnish at his own expense," it follows that the plaintiff is entitled to sue as beneficiary under the contract, and to recover of the surety company the balance due by Pierce for the execution of such work by the plaintiff. The identical point presented in this case was decided in *Lester v. Houston,* 101 N. C., 605, in an opinion by *Smith, C. J.*, the third headnote of which is as follows:

"3. The constitutional provision for giving to mechanics and laborers liens for their work, and the statutes enacted in pursuance thereof, and also giving liens for materials furnished, extend to and embrace contractors who do not themselves perform the labor or furnish the materials used, but procure it to be done through the agency of others."

This was cited with approval by *Allen, J.*, in *Mfg. Co. v. Andrews,* 165 N. C., 292, 293.

The judgment sustaining the demurrer should be

Reversed.

LULA LEE, ADMX., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 September, 1918.)

1. Carriers of Passengers — Ejecting Passenger — Helpless Passenger — Drunkenness—Dangerous Place.

Where there is evidence tending to show that a passenger on a railroad train was too drunk to get on without assistance; was moved by the conductor into the smoking compartment of the car; was too drunk to find the ticket he had purchased, and was put off by the conductor, after dark, at a place to which he had paid a cash fare, with abusive words from him, where he was in danger, owing to his condition, from passing trains, and one of them ran over and killed him, it is sufficient to be submitted to the jury upon the actionable negligence of the conductor in thus ejecting a helpless passenger at a dangerous place; and testimony of ejaculations of passengers, in the conductor's presence and hearing, as to the passenger's helplessness upon the track, and his danger from passing trains, is competent upon the question of the knowledge of the conductor at the time.

2. Appeal and Error—Carriers of Passengers—Ejecting Passenger—Negligence—Evidence—Trials.

Where judgment has been rendered against a railroad company upon a trial directed solely to the question of the actionable negligence of the conductor in ejecting the plaintiff's intestate, a passenger upon his train, at a dangerous place while in a drunken and helpless condition, the result will not be affected, on appeal, by the lack of evidence of negligence of the employees on a following train of the defendant, which struck and killed him.

APPEAL by defendant from *Daniels, J.*, at April Term, 1918, of EDGECOMBE.

This is an action to recover damages for the wrongful death of one Lee, caused, as the plaintiff alleges, by the negligence of the defendant in the expulsion of Lee from the train of the defendant while intoxicated and in a helpless condition, and at a place where he was in danger of being run over by passing trains.

The evidence tends to prove that the deceased was at Petersburg, Va., on 9 January, 1916, the last day intoxicating liquors were sold in Virginia; that deceased bought a ticket at Petersburg for Battleboro, in North Carolina, and boarded the train of the defendant as a passenger.

Frank Grear, a witness for the plaintiff, testified as follows: "I live at Rocky Mount; went to Hopewell, Va. On my return trip I was at Petersburg and saw Frank Lee in station at Petersburg. I knew him; recognized and spoke to him. He was under influence of liquor. I left him sitting there until time for train to go to Rocky Mount. I asked him if he was going there. He said yes. Told him that he better get his ticket; helped him to the window. He got his ticket and put it in his pocket. When train came I took him out of the sitting-room and helped

him up on the train. When the train came, helped push him up. Left him in the passway of the train; went to the smoker. When left Washington Street Station, conductor came for tickets; saw Lee fumbling about. I stood up and looked at him. He got up, being so full of whiskey, was fumbling all round his pocket for his ticket. Conductor told him to have his ticket when he came back; was not long before conductor came back with him in the smoker; saw Lee give him $1. Conductor told him that would take him to Emporia, and when he got there, would have to have his ticket. He could not walk by himself. Conductor had him by each shoulder when he came in the smoker with him. He staggered some; would fall against the side and catch the seat. Suppose conductor saw his condition. He brought him in the smoker. After Lee paid the $1, conductor put him down in the smoker; told him not to go into the other car. There had been some complaint about his falling over other passengers. Frank got quiet and seemed to fall asleep. When the train got to Emporia, stopped where it usually does. Lee did not get up; seemed he was asleep, leaning over, with his head on his arms; was about 7 o'clock, January; was dark when the train started off; was not long before the conductor walked in and said to Lee, 'Give me your ticket.' Train had gone, I suppose, about a mile from station, when conductor caught hold of Lee and asked for his ticket. He rolled his eyes up at him and said, 'What to hell do you want?' The conductor said, 'You doggone son of a bitch, you have worried me enough; I am going to put you off the train.' He caught hold of him one one side, and Mr. Pittman on the other, and walked with him to the platform and put him on the ground. I crossed over and went to the window, on the side they put him off, and looked at him. The conductor had pulled the train off. Mr. Pittman had left him. He was right near the train. Conductor pulled the train. He and Mr. Pittman could both have seen him staggering. Mr. Pittman is railroad detective. I said something. The conductor was present. I don't know whether he heard me or not. I wouldn't swear that Mr. Pittman heard what I said. He was in the smoker at the time. He is a railroad detective. I said, 'Well, if this train don't kill him, the next one will, because he is right between the train.' Everybody in the smoker could have heard it. Mr. Pittman was about 2 yards from me. I was speaking in an ordinary tone of voice. Lee could not have gotten off train by himself."

Another witness testified: "Lee walked bad. Conductor pulled cord Seem train hardly stopped when they put him off." Here witness said: "I heard some one say—don't know who said it—the conductor and detective heard what was said—some one said, 'Look yonder; he is scrambling on the ground, trying to catch the train.' I didn't see him; was on opposite side of train. Conductor knew he was drunk. He was not

bothering anybody when they put him off. He was worse when they put him off than when he got on the train at Petersburg."

It was also in evidence that another train of the defendant passed the place where he was ejected within 30 minutes, moving at a high rate of speed, and that there were signs on the ground and roadbed indicating that the deceased was struck about a car-length from the place where he was put off the train.

There was evidence on behalf of the defendant contradicting practically all of the evidence offered by the plaintiff.

At the conclusion of the evidence there was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

There are other exceptions, which will be adverted to in the opinion.

The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon, from which the defendant appealed.

Fountain & Fountain and G. M. T. Fountain & Son for plaintiff.
F. S. Spruill and John L. Bridgers for defendant.

ALLEN, J. It is contended in the brief of the defendant that the motion for judgment of nonsuit ought to have been sustained, because there is no evidence that the intestate of the plaintiff was down on the track in an apparently helpless condition, or, if in this position, that he could have been discovered by the employees of the defendant on the second train in time to avoid the killing, by the exercise of ordinary care but it appears from the record that the action was not tried on this theory, and, on the contrary, that liability was imposed on the defendant and a recovery permitted under the principle announced in *Roseman v. R. R.*, 112 N. C., 716, where it is held that if the power given by law to eject a passenger, in proper cases, "is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion," and that "Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood R. R. Law, sec. 362; 2 Sherman & Red. Neg., sec. 493; *R. R. v. Right,* 34 Am. Rep., 277."

That this is the ground upon which damages have been awarded is clearly shown by the charge, and it is not contended there is no evidence to support it. His Honor instructed the jury that "No man had a right to ride upon a common carrier without either purchasing a ticket or tendering his fare; and even though the passenger has a ticket and fails to produce it, either from his own carelessness or drunkenness, that doesn't

relieve the conductor of his right and duty to put him off if he doesn't tender the ticket or the fare. So that, ordinarily, if the passenger, as in this case, does not, upon the demand of the conductor, produce a ticket or pay his fare, and is put off the train, he would have no cause of complaint, because in that event the conductor would only be performing his duty to the railroad company. But this has the qualifications that, as a general rule of law—and that is insisted upon as the ground of liability in this case—if the passenger be in such a condition, either from drink or from disease, that the conductor, in making his observations incident to the performance of his duties in going through the train and taking up tickets and caring for his passengers, had reason to believe that the passenger was in such condition, mental or physical, as that being put off the train he would be incapable of providing for his own safety, and while in that condition he was put off, and as the proximate result thereof he was run over and killed by a train of the defendant, then there would be actionable negligence. I may say, further, gentlemen, that in the view I take of this case there was no negligence on the part of the defendant's conductor, either upon the testimony of the plaintiff or the defendant, as to the place at which the plaintiff's intestate, Frank Lee, was put off the train. . . . So that, your real inquiry, as I understand the contentions of the plaintiff and defendant, is whether it was a breach of duty on the part of the defendant in putting him off while he was in such a condition that he was incapable of caring for his own safety. If he was in this sort of condition, and that could have been reasonably perceived by the conductor in performing his duties to the company and to the passengers, then he ought to have been carried to the next station and turned over to the authorities there to be taken care of, and ought not to have been put off the train in a condition where he was unable from drunkenness to protect himself from the dangers of the moving train. . . . And I charge you upon this first issue that if the evidence satisfies you by its greater weight, the burden being upon the plaintiff, that at the time the passenger, Frank Lee, was put off the train he was incapable from drunkenness of caring for himself and providing for his own safety, and the conductor, in the discharge of his duty as such conductor, could reasonably have perceived from all the surrounding circumstances that he was in that condition, and put him off, knowing or having reason to believe that he was in that condition, and as a proximate result thereof he was run over and killed, then you would answer this first issue 'Yes.' Unless you are so satisfied, you would answer it 'No.'"

We are therefore of opinion the motion for judgment of nonsuit was properly overruled.

The statement of a witness, "If this train don't kill him, the next will," and of another, "He is scrambling on the ground, trying to catch the train," both made in the presence of the conductor, according to the evidence of the plaintiff, were competent on the question of knowledge of the helpless condition of the intestate.

The other exceptions require no discussion further than to say that the charge is full, clear, and accurate, and fair to both parties, and we find nothing justifying the criticism that it unduly emphasizes the contention of either party.

No error.

A. C. HASSELL v. DANIELS, PUGH & CO.

(Filed 18 September, 1918.)

1. Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Evidence—Nonsuit—Trials.

Where there is evidence tending to show that an employee was directed by his superior to oil the cups on top of the defendant's compressor every half-hour, requiring him to stand on a ledge 3 or 3½ inches wide, wet with oil, 2 or 2½ feet from the floor, which, according to the blue-print and custom, should have been level with the ground; that the oiling in this manner required him to stand on this ledge, with an oil can in one hand and a funnel in the other, closely between a rapidly revolving 14-foot drive-wheel and rapidly moving piston-rod and shaft; that a guard-rail was customarily used and could have been provided, at small expense, which would have prevented the accident; and that the injury complained of was caused by the existing conditions: *Held*, the place provided by the employer is not a safe place to work, as a matter of law; the evidence is sufficient to take the case to the jury, upon the issue of defendant's actionable nebligence and proximate cause, and a judgment of nonsuit will be set aside on appeal.

2. Same — Pleadings — Contributory Negligence — Proximate Cause—Evidence.

Held, under the evidence of this case, the question of proximate cause was for the jury, and there was no evidence of contributory negligence under the allegations in the answer.

3. Pleadings—Assumption of Risks.

The doctrine of assumption of risks must be pleaded to make this defense available.

APPEAL by plaintiff from *Connor, J.*, at May Term, 1918, of DARE.

This is an action to recover damages for personal injury, the plaintiff alleging that he was in the employment of the defendants and that they failed to furnish him a reasonably safe place to work and to provide

safety appliances in general use, and that he was injured by reason thereof.

At the conclusion of the evidence his Honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

Ehringhaus & Small for plaintiff.

C. R. Pugh, B. G. Crisp, W. A. Worth, C. E. Thompson, Aydlett, Simpson & Sawyer, and Meekins & McMullan for defendant.

ALLEN, J. The plaintiff offered evidence tending to prove that he was in the employment of the defendants at the time of his injury, and that one Hogan, another employee, was his superior, whose orders and directions he was compelled to obey; that on the night he was injured, about 12 o'clock, Hogan was asleep, but had left orders for plaintiff to oil the cups of the compressor every half-hour; that the compressor in this factory is a large machine, designed to sit flat on the floor, but when installed in this plant, instead of following blue-print specifications, it was put up on a concrete bed or table some 2½ feet above the floor; that this was done on account of the marshy character of the ground, to prevent having to dig a deep trench for the big 14-foot drive-wheel; that instead of making the bed or table large enough for one to stand on in safety, only a 3- or 3½-inch ledge was left; that facing the north end of this bed or table the 14-foot drive-wheel was on the left, about 2 feet away; that the axle to this worked in a journal on top of the compressor machine, and on top of this journal were oil cups; that to the right and on the right side of the compressor was the piston-rod, arm, and shaft; that the compressor was a solid-iron machine, bolted down, with a rim to catch oil around the edges; that the only way provided to oil the cups in this factory was to step up astride the northeast corner of the bed or table, with the feet resting on the narrow ledge, which had become slippery with oil, and, leaning forward, resting the body against the compressor machine, with oil can in right hand and funnel in left, pour oil into cups, there being just room enough for the right elbow to clear the piston arm and the left elbow the inside drive-wheel; that both of these were revolving at the rate of 70 a minute; that if the machine had been installed on the floor as designed, there would have been enough room for one to catch himself, even if the arm had been knocked by the piston, but, standing on the narrow, slippery ledge when this happened, one could only fall in the drive-wheel, as there was no rail to guard against this, though a rail had been provided; that it would have cost but a trifling amount to provide a rail, and such were in general and approved use; that such a rail or guard would have prevented the injury to plaintiff; that plaintiff, while oiling these cups, near midnight, under orders, had his right

arm knocked by the piston, and this, on account of the narrow, slippery ledge, caused his left foot to slip off and himself to fall into the driving-wheel; that in consequence he was carried around by the wheel, thrown to the ceiling, across the machinery, then to the floor, and severely injured, losing his leg and suffering several fractured bones, loss of time, earning capacity, and great pain of body and mind.

This evidence must be accepted as true on a motion for judgment of nonsuit, and the plaintiff is entitled to every inference therefrom in his favor that may be reasonably inferred, and when so considered it proves a breach of duty on the part of the defendants, which caused the injury to the plaintiff, in that it shows that the defendants failed to provide a reasonably safe place to work, and to use appliances approved and in general use, which is the measure of duty imposed on the defendants by law. *Deligny v. Furniture Co.,* 170 N. C., 201, and cases cited.

The plaintiff was injured while performing a duty for the defendants under orders from his superior, and he was required to stand above the floor, on a ledge about 3 inches wide, made slippery by the dripping oil, and to lean forward, with an oil can in one hand and a funnel in the other, both necessary implements in the performance of his duty, and pour oil in cups between a piston-arm and drive-wheel, each making 70 revolutions a minute, and when he necessarily came within 3 or 4 inches of the moving machinery, and this cannot be held to be a safe place to work, as matter of law.

The case is stronger for the plaintiff than *West v. Tanning Co.,* 154 N. C., 44, in which a recovery for damages was sustained.

There is also evidence that it is usual and customary in plants like those operated by the defendants to have a rail by the drive-wheel, and that if one had been present the plaintiff would not have been injured.

The question of proximate cause involved in the first issue was for the jury, under the authority of *Taylor v. Lumber Co.,* 173 N. C., 112, and cases cited; and if there is evidence of assumption of risk, which is doubtful, this defense is not pleaded, nor is there any evidence to support the allegations of contributory negligence in the answer, to wit: (1) That plaintiff belonged in another part of the mill and had left his own work to go to a place where he had no business, and (2) that there was another and safe way in which to oil, to wit, stand in the oil trench.

The judgment of nonsuit must therefore be set aside, in order that the matters in controversy may be submitted to a jury.

Reversed.

T. H. WILLIAMS AND WIFE, DORA, v. BLANCHE HONEYCUTT, ADMX. AND WIDOW OF R. A. HONEYCUTT, AND ADOLPH HONEYCUTT AND OTHER HEIRS AT LAW OF R. A. HONEYCUTT.

(Filed 25 September, 1918.)

1. Trusts—Parol Trusts—Declarations—Evidence.

A parol trust may be engrafted upon the title of a purchaser of land at a mortgage sale; and where the evidence is clear, cogent, and convincing, testimony of the declarations of purchaser, made after the sale and transmission of the legal title to himself, is not incompetent because resting in parol.

2. Pleadings— Evidence— Variance— Trusts— Parol Trusts— Principal and Agent.

Where the complaint in a suit to engraft a parol trust upon the legal title of a purchaser at a mortgage sale of land sufficiently alleges that the land belonged to the wife, and that the negotiations resulting in the trust were made by the husband with such purchaser, acting as his wife's agent, evidence of the transactions so made in the wife's behalf is not variance with the pleadings and objectionable on the ground of a fatal variance between the allegation and the proof.

3. Same—Judgments.

Where the wife has commenced suit to engraft a parol trust in her favor on the title of a purchaser at a mortgage sale of her lands, and it appears that the agreement was made between the purchaser and her husband as her agent, and the wife has since died and the action maintained by her husband and heirs at law: *Held*, the fact of the husband's agency is immaterial, as the judgment in plaintiff's favor will bind the parties.

4. Principal and Agent—Undisclosed Principal—Contracts—Actions.

It is unnecessary that the name of a principal be disclosed for him to maintain an action on a contract made by his agent in his behalf.

ACTION tried before *Whedbee, J.*, at March Term, 1918, of CHATHAM. From judgment of nonsuit plaintiffs appealed.

R. O. Everett and R. H. Hayes for plaintiffs.

Dawson, Manning & Wallace, Bryant & Brogden, Siler & Barber, R. H. Dixon, and H. M. London for defendants.

BROWN, J. The plaintiffs seek to establish a parol trust in favor of Dora Williams, wife of plaintiff F. H. Williams, and to convert defendants, heirs at law of R. A. Honeycutt, into trustees for her benefit. Dora Williams died pending the action, and her heirs at law have been made parties plaintiff.

They allege that certain lands described in the complaint, belonging to Dora Williams, were sold under the power of sale contained in a deed in trust to R. O. Everett, trustee, and bid off by R. A. Honeycutt; that

he purchased them for plaintiff F. H. Williams and under an agreement made at time of sale or prior thereto that the said plaintiff should repay to Honeycutt the amount of the indebtedness secured on said land; that plaintiffs have tendered the amount advanced by Honeycutt in paying off all the mortgage debts on the land, and defendants refused to accept same and to convey the property; that the property is worth $8,000 or $10,000, a sum very largely in excess of the liens upon the same.

For the purpose of establishing the trust, plaintiffs introduced several witnesses who testified to declarations made by Honeycutt. These declarations, along with the other evidence, are competent and tend to prove that he purchased the land in pursuance of an agreement with plaintiff F. H. Williams, and that Honeycutt was acting for him, and were properly admitted in evidence.

It is undoubtedly true that a beneficial interest or estate in real property cannot be conveyed by parol, but the declarations of Honeycutt are evidently offered for no such purpose. Declarations of Honeycutt made after the sale and transmission of the legal title are competent to prove the previous agreement between Williams and Honeycutt, as much so as they would be competent to prove any preceding act of the declarant. That a trust such as is sought to be created in this case may be established by parol evidence, that is clear, cogent and convincing, is too well settled to admit of dispute. *Avery v. Stewart,* 136 N. C., 426; *Sykes v. Boone,* 132 N. C., 199; *Cobb v. Edwards,* 117 N. C., 246.

Nor do we think there was a fatal variance between the pleadings and proof. The complaint alleges with sufficient clearness that the land belonged to the wife, and that in the negotiations with Honeycutt to save her property the husband was acting for her and as her agent. That is set out and admitted in the complaint. As the husband and the heirs of the wife are parties plaintiff, it is a matter that does not concern defendants as to whether the husband was acting for himself or his wife. They will all be bound by the decree that may be rendered.

It is fair to presume that the husband was not endeavoring to save his wife's land for his own exclusive benefit and to rob her of it. In order to bind Honeycutt it is not necessary that he should have known that Williams was acting in behalf of his wife. The right on a principal to maintain an action to enforce a contract made by his agent in his own name without disclosing the name of the principal is well settled. *Cowan v. Fairbrother,* 118 N. C., 406; *Oelrichs v. Ford,* 21 Md., 489; *Barbour v. Bell,* 112 N. C., 133. The principle is stated and the subject discussed in *Nicholson v. Dover,* 145 N. C., 19.

It is to be noted here, as in that case, that the personality of Mrs. Williams is not the ground of the refusal to perform the agreement, but the defendants deny there was any such agreement.

The judgment of nonsuit is set aside and the cause remanded for trial upon proper issues.

Reversed.

T. C. MANN v. FAIRFIELD AND ELIZABETH CITY TRANSPORTATION COMPANY AND NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 25 September, 1918.)

Carriers of Goods—Commerce—Federal Statutes—Notice of Claim—Bills of Lading.

The Federal statutes controlling a recovery of damages to an interstate shipment by common carriers, on a through bill of lading, amendatory to the Carmack Amendment, and also the Cummins Amendment to the Interstate Commerce Act, vol. 38, Part I, U. S. Statutes at Large, ch. 176, page 1196-7, while recognizing the rights of the carrier, in proper instances, to stipulate for the presentation and filing of claims within a stated period, restricting such rights to a period of ninety days in one instance and four months in another, further provides that if the loss, damage or injury is due to delay in transit by carelessness or negligence, then no notice or filing of claim shall be required as a condition precedent to recovery; and where a connecting carrier has caused damages to a shipment in a manner coming within the terms of the last named proviso and action therefor has been commenced within two years, as the statute requires, against the initial carrier, giving a through bill of lading, the defendant is deprived of any defense which might arise from failure of plaintiff to give the notice stipulated for in the bill of lading and otherwise coming within the terms of the Federal statutes, and the plaintiff may recover damages to the shipment caused by a connecting carrier alone.

ACTION to recover damages for negligent delay and injury in transporting a shipment of 201 hogs, tried before *Bond, J.*, and a jury, at Special Term, 1918, of HYDE.

The evidence of plaintiff tended to show that on 18 December, 1917, he shipped with defendant Fairfield and Elizabeth City Transportation Company, at Fairfield, N. C., 201 hogs under a through bill of lading, via Elizabeth City to Onley, Va., the Norfolk and Southern Railway being the next connecting carrier. That Onley is 110 miles from Elizabeth City and the shipment was received at Onley on the next Monday, seven days thereafter, one of the hogs missing and four dead and the others in a greatly damaged condition. This incident to the wrongful delay and negligence in the transportation.

The case on appeal states, as an admission of plaintiff on the trial, that the hogs were delivered in due time and in good shape to the Norfolk and Southern, the next connecting carrier, at Elizabeth City, and all the negligence complained of was after the shipment left the imme-

diate charge of the defendant, the initial carrier; that plaintiff instituted suit in a proper court for recovery of said damages and filed complaint therein less than four months after the injury complained of.

On denial of liability, defendant put in evidence a stipulation in the bill of lading as follows:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months of delivery of the property, or in case of failure to make delivery, within four months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The jury rendered the following verdict:

1. Was plaintiff injured by damage done to his hogs, caused by the negligence of defendants, connecting carriers, as alleged? Answer: "Yes."

2. If so, what damage is plaintiff entitled to recover of defendant company? Answer: "$700."

3. Did plaintiff give notice of his claim in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or within four months after a reasonable time for delivery had elapsed, as alleged in the answer? Answer: "No."

4. Did plaintiff begin suit, have summons served, and complaint filed within less than four months from time of injury to said hogs? Answer: "Yes."

It appears that a nonsuit had been entered as to the Norfolk and Southern, and, on motion, there was judgment for defendant, the Transportation Company, the court being of opinion that the clause in the bill of lading requiring notice in writing to be given in four months after the delivery was not complied with by the commencement of the action and filing complaint within said time. Plaintiff, having duly excepted, appealed.

Ward & Grimes for plaintiff.
Spencer & Spencer and Meekins & McMullan for defendant.

HOKE, J. The Federal statute more directly relevant to the inquiry, amendatory of the Carmack Amendment and containing also the Cummins Amendment to the Interstate Commerce Act, appears in Vol. 38, Part I, U. S. Statutes at Large, chap. 176, pp. 1196-7, as follows:

"That any common carrier, railroad or transportation company, subject to the provisions of this act, receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country,

shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railway or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and any such common carrier, railroad or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia, to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made, is hereby declared to be unlawful and void: *Provided, however*, that if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further*, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits

than two years: *Provided, however,* that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

This statute, approved 4 March, 1915, retains so much of the Carmack amendment as requires, in interstate commerce, the issuance of a through bill of lading by the initial carrier, and making such carrier liable for any loss, damage, or injury to a shipment of that character, caused either by such initial carrier or any connecting carrier, and, in addition, makes such carrier liable, whether a bill of lading has been issued or not, for the *full* actual loss or damage or injury to such property caused by it, etc., "notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt or bill of lading, etc., or in any contract, rule, regulation, or tariff filed with the Interstate Commerce Commission, and any such limitation, without respect to the manner and form in which it is sought to be made, is declared unlawful and void." The single restriction, as to the effect of this very sweeping provision, is that if the goods are "hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to their character, it may require the shipper to state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated."

While the statute recognizes the right of the carrier, in proper instances, to stipulate for the presentation and filing of claims within a stated period, restricting such rights to a minimum period of ninety days in the one case and four months in the other, the last clause of this amendatory act provides that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice nor filing of claim shall be required as a condition precedent to recovery.

The verdict having established that the loss and damage complained of in the present instance was caused by the negligence of the connecting carrier, the plaintiff's claim comes clearly within the express terms of the statute, and defendant is thereby deprived of any defense which might arise from failure of plaintiff to give the notice.

There are decisions of this State in actions against telegraph companies, favoring the position that a suit instituted and more especially complaint filed within the time will be sufficient compliance with the stipulation as to notice, or that it dispenses with the giving of other notice than the suit affords (*Mason v. Telegraph Co.,* 169 N. C., 229; *Bryan v. Telegraph Co.,* 133 N. C., 603), and a like decision has been made elsewhere in case of express companies (*So. Ex. Co. v. Ruth & Sons,* Ala.

Ct. App., 538; 59 So.), but the position is not considered; the statute applicable, and which affords the exclusive and prevailing rule on the subject, having, as stated, abolished the defense on facts presented by the record. *Bryan v. R. R.*, 174 N. C., 177; *Taft v. R. R.*, 174 N. C., 211, and *McRary v. R. R.*, 174 N. C., 563, were causes which arose before the statute and the defense referred to was recognized and enforced for that reason.

There is error in the ruling of the court, and we are of opinion that, on the verdict, the plaintiff is entitled to judgment.

Reversed.

J. A. PRITCHARD ET ALS. v. D. E. WILLIAMS.

(Filed 25 September, 1918.)

1. **Betterments—Statutes—Color of Title—Good Faith—Reasonableness—Issues—Title—Evidence—Questions for Jury—Trials.**

   Under our statute (Revisal, sec. 652), one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover betterments in an action by the true owner to recover the lands; answers to the issues as to the title alone being insufficient, the *bona fides* of the belief and its reasonableness being for the determination of the jury upon the entire evidence. The appropriate issues are suggested by the court.

2. **Betterments—Statutes—Use and Occupation—Limitation of Actions.**

   Where one in possession of lands is entitled to recover, against the true owner, for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. Revisal, sec. 653.

PETITION for betterments, heard and determined before *Bond, J.*, at July Term, 1918, of CAMDEN.

From a judgment dismissing the petition defendant appealed.

D. H. Tillitt and Meekins & McMullan for plaintiffs.

Aydlett, Simpson & Sawyer, R. C. Dozier, and Ehringhaus & Small for defendant.

BROWN, J. This cause was before us at last term (175 N. C., 320), where the facts are fully stated in the opinion by *Mr. Justice Allen*. When tried upon the issues raised by the complaint and answer, these facts were found:

1. Did Joseph G. Hughes hold the property sued for in trust to convey the same, as alleged in the complaint? Yes.

2. Did the defendant, or any of those under whom he claims, purchase the 160-acre tract for value and without notice of said trust? No.

3. Did the defendant, or any of those under whom he claims, purchase the 80-acre tract for value and without notice of said trust? Yes.

The plaintiffs contend and the court adjudged that the findings of the jury bar the right of defendant to betterments.

The claim for betterments in this case is statutory, and the petition conforms literally to the statute.

The petitioner avers "That while holding the said premises under the color of title above referred to, which was verily believed by this defendant to be good, this defendant made extensive and permanent improvements upon the premises described in said deeds, to the value of $9,250, expending a large sum of money and labor, which improvements greatly enhanced and increased the value of said premises, to the extent of dollars and cents above named."

The issues that should be submitted to a jury under the betterment statute (Revisal, 652) are much broader and more comprehensive than those raised by the pleadings and determined by the jury in this case.

In order to convert the defendant into a trustee, it was sufficient to fix him with either actual or constructive notice of the trust. But where the defendant has entered in good faith, and "while holding the premises under a color of title believed by him to be good," makes permanent improvements, the statute requires that something more than a notice of a trust or adverse claim shall be established before he will be deprived of permanent improvements made in good faith. To do entire justice, however, the statute requires that for the purpose solely of offsetting such improvement, the petitioner for betterments shall be charged with the use and occupation of the land, without regard to the three-year limitation. Section 653.

It is the holder in bad faith that is deprived of his improvements, and not one who holds in good faith under a title believed by him to be good. But there must be shown not only an honest and *bona fide* belief in petitioner's title, but he must satisfy the jury, also, that he had good reason for such belief; and it is for the jury to judge of the reasonableness of such belief, based upon the entire evidence. *R. R. v. McCaskill*, 98 N. C., 527; *Baxter v. Justice*, 93 N. C., 406; *Merritt v. Scott*, 81 N. C., 385.

The right to betterments is based upon the obvious principle of justice that the owner of land has no just claim to anything except the land itself, and fair compensation for damage and loss of rent. If the claimant, acting under an erroneous but honest and reasonable belief that he is the owner, makes valuable and permanent improvements, the true

owner should not take them without compensation. The statute undertakes to declare and establish the equities between them.

In discussing this question, it is said in R. C. L. Improvements, section 2, that "The good faith which will entitle to compensation for improvements has been defined to mean simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy."

There are many cases where it has been held that although aware of an adverse claim, the possessor may have reasonable and strong grounds to believe such claim to be destitute of any just or legal foundation, and so be a possessor in good faith, and as such entitled to compensation for improvements. The principle here declared has been recognized and applied by this Court in *Alston v. Connell,* 145 N. C., 6, and *Faison v. Kelly,* 149 N. C., 282, as well as by the Courts of other States. *Tumbleston v. Rumple,* 43 S. C., 275; *Templeton v. Lowry,* 22 S. C., 389; *Parrish v. Jackson,* 69 Tex., 614; *Gaither v. Hamrick,* 69 Tex., 92; *Elam v. Parkhill,* 60 Tex., 581; *Hutchins v. Bacon,* 46 Tex.. 408; *Dorn v. Dunham,* 24 Tex., 366; *Hairston v. Sneed,* 15 Tex., 307; *Sartain v. Hamilton,* 12 Tex., 219 (62 Anno. Dec., 524); *Griswold v. Brugy,* 6 Fed., 342; *Cahill v. Benson,* 19 Tex. Civ. App., 40; *Whitney v. Richardson,* 31 Vt., 300.

We are of opinion that the Court erred in holding that upon the issues heretofore found the defendant is barred from asserting his claim to betterments under the statute.

The judgment is set aside and the cause remanded, with instructions to submit proper issues to the jury.

Reversed

ADDENDA.

We suggest the following as proper issues arising generally on a petition for betterments:

1. Did the petitioner make permanent improvements upon the land under a title believed by him to be good?

2. If so, did petitioner have reasonable grounds to believe that he had a good title to the land when he made such improvements?

3. What is the value of such permanent improvements?

4. What sum as rents for the land shall petitioner be charged with as a set-off against such improvements?

A. L. DAIL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 25 September, 1918.)

1. Railroads— Crossings— Street Cars— Motormen—Negligence—Contributory Negligence—Proximate Cause—Speed Ordinance.

In an action to recover damages of a railroad company for a personal injury to plaintiff, temporarily acting for a motorman, at his request, in running a street car approaching a railroad crossing, there was evidence tending to show that the street car was very slowly moving towards the railroad track, and that the defendant's train, hidden by an obstruction, was exceeding the speed ordinance of the town and moving backwards without signal or proper lookout, ran upon the street car, just entering upon the railroad track, and injured the plaintiff. *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and as to whether the plaintiff was guilty of contributory negligence in acting without taking a reasonable and proper observation as to the danger, or whether he should have stopped the street car, in the exercise of reasonable care, before going upon the crossing. The judge left the question of proximate cause to the jury under a proper charge.

2. Railroads— Street Railways— Crossings— Negligence— Contracts— Evidence.

A contract between a street car company and a railroad company requiring that the cars of the former should come to a full stop a distance of fifty feet before reaching a railroad crossing is no defense to an action against the railroad company brought by one operating the car, to recover for an injury alleged to have been caused by the train negligently running upon the car, when the plaintiff had no knowledge thereof and was not a party thereto; and the contract is properly excluded from the evidence.

3. Actions—Parties—Contracts—Negligence.

The liability of a street car company to a railroad company under a contract for injuring the former's motorman in a collision at a crossing will not be considered in the motorman's action against the railroad company alone.

APPEAL by defendant from *Allen, J.*, at February Term, 1918, of CRAVEN.

This is an action for personal injuries sustained by the negligence of the defendant.

D. L. Ward and A. D. Ward for plaintiff.
Moore & Dunn for defendant.

CLARK, C. J. The plaintiff was temporarily operating a street car in New Bern, as it approached the crossing of the defendant's track. He was a policeman, but had formerly been a motorman on the street car and was familiar with its operation. On this occasion the motorman desired to change his shoe, and at his request the plaintiff ran the

car for a short distance. As he approached the crossing, he testified that he slowed down the car, which was barely moving, and listened, but could not see the approaching train because of a building at the corner, until within a few feet of the railroad track. The defendant was backing nineteen box cars, with the engine at the other end, through a populous section of the city without any one on the car next to the crossing to keep a lookout or wave a flag or give any other notice. There was evidence that it did not ring the bell, and that it was running more than ten miles an hour in violation of the ordinance of the city of New Bern, which prohibits the defendant from running its cars through the street at a greater speed than five miles an hour.

The street car which plaintiff was operating was moving very slowly, and had gotten about six inches on the plaintiff's track when the defendant's train backing at a forbidden speed struck the car, knocked it off the track, and injured the plaintiff.

The defendant excepted because the court charged the jury that if it should find that the defendant was running its train backwards at an excessive rate of speed in violation of the city ordinance, without ringing the bell, and without having a proper lookout on the car next to the crossing, and ran down the street car, injuring the plaintiff, and it should further find that this negligence was the proximate cause of the injury, to answer the first issue "Yes," otherwise to answer "No." He also instructed the jury, in substance, that it was the duty of the plaintiff operating the street car, on approaching the crossing, to have the car under control and not to approach the crossing without making a reasonable and proper observation, whether there was any danger ahead, and before going upon said crossing to stop, look and listen for the said train, if the jury should find upon the evidence that he should have done so in the exercise of reasonable care, and if he failed to do so and such failure was the proximate cause of the injury, the plaintiff could not recover.

The defendant excepted to the above charges, but they are sustained by the carefully considered opinion of *Hoke, J.*, in *Shepard v. R. R.*, 166 N. C., 539, that whether the failure of the driver of a vehicle crossing a railroad track to come to a full stop is contributory negligence, barring a recovery, is for the jury upon the evidence. The trial judge seems to have followed carefully that case, which has been approved. *Hunt v. R. R.*, 170 N. C., 444; *Brown v. R. R.*, 171 N. C., 270.

The defendant offered a contract between the street railroad company and the defendant which provided that the street cars should come to a full stop a distance of fifty feet before reaching the crossing. The plaintiff was not a party to this contract and testified that he had never heard of it. The court properly excluded it. Such contract might be

competent in an action between the street car company and the defendant, but was no protection to the railroad company for injuries sustained by the plaintiff by reason (as the jury find) of the defendant running its train backward at an excessive speed, prohibited by the city ordinances, and without lookout on the rear end of the car. *Burton v. Mfg. Co.*, 132 N. C., 17. This seems to have been the real question in the case.

The court submitted the question of proximate cause to the jury. *Spittle v. R. R.*, 175 N. C., 500.

Whether the defendant can recover out of the street car company for the damage sustained by the plaintiff under its contract with the street railroad, which provides that it "will indemnify and save harmless the A. C. L. R. R. Co. from any and all loss, cost or damage, which may be incurred by said A. C. L. R. R. Co. by reason of any accident or casualty occurring at said crossing, which is proximately due to the neglect of the street railroad company or its employees, either in the operation of its cars over said crossing or in the safe and proper maintenance of the same," is a question which can arise only in an action by the railroad company to recover of the street railroad company the sum which it will pay out under this judgment.

No error.

AMOS BYRD AND WIFE v. LARRY S. BYRD ET AL.

(Filed 25 September, 1918.)

1. Estates—Rule in Shelley's Case—Deeds and Conveyances—Intent.

The Rule in Shelley's Case, where applicable, is a rule of property without regard to the intent of the grantor or devisor. *Triplett v. Williams*, 149 N. C., 241, cited and distinguished.

2. Estates—Rule in Shelley's Case—Fee-simple Title.

A conveyance of land to B. and L. and their heirs, upon "the condition that they are to have a life estate in the above-described tract of land, and then" to their "bodily heirs," comes within the Rule in Shelley's Case and conveys a fee-simple absolute title to B. and L.

3. Same—Cloud on Title—Equity—Suits.

The holders of the fee-simple title to lands may maintain a suit to remove a cloud upon their title against those who claim that the deed under which it is derived only conveyed a life estate with the remainder in the claimants, and that the Rule in Shelley's Case had no application to the terms used in the conveyance.

ACTION to remove a cloud from title, tried before *Allen, J.*, at May Term, 1918, of PITT.

There was judgment for plaintiffs, and defendants having duly excepted appealed.

F. C. Harding for plaintiff.
F. M. Wooten for defendant.

HOKE, J. Plaintiffs, holding the lands in question as grantees in a deed from B. S. and Louisa Byrd, of date 13 November, 1906, instituted the present action against their infant children, alleging that under said deed they owned said land in fee simple, and that defendants wrongfully asserted that plaintiffs only had a life estate under said deed, and by reason of said claim the ordinary and beneficial rights of plaintiffs as absolute owners were greatly impaired, etc. A guardian *ad litem* having been duly appointed, a verified answer was filed for infant defendants, admitting that plaintiff held the land under said deed and alleging that the same only conveyed life estate to plaintiffs with remainder to the defendants, etc.

The deed from B. S. and Louisa Byrd, on matter relevant to the inquiry:

"Witnesseth, That B. S. and Louisa Byrd, grantors, have bargained and sold to Amos Byrd and wife, May Byrd, and do bargain, sell and convey to them and their heirs the land, describing it . . .

"The condition of this deed is such that the said Amos Byrd and wife are to have a life estate in the above-described tract of land, and then to the bodily heirs of the said Amos Byrd and wife, May Byrd. It is also understood that this is to be the full share of the said Amos Byrd and wife, May, in the distribution of the estate of the said B. S. Byrd and wife, Louisa.

"To have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging to the said Amos Byrd and wife, May Byrd, and their heirs, to them and their only behoof. And the said B. S. Byrd and wife, Louisa Byrd, covenant that they are seized of said premises in fee, and have the right to convey the same in fee simple; that the same is free from all encumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whatever."

Under the Rule in Shelley's Case, as interpreted and applied in numerous decisions of the Court, the deed in question clearly conveys to plaintiff an estate in fee simple (*Crisp v. Biggs,* at present term; *Cohoon v. Upton,* 174 N. C., 88; *Robertson v. Moore,* 168 N. C., 389; *Edgerton v. Aycock,* 123 N. C., 134), and our cases are equally decisive that plaintiffs are of right entitled to the relief sought in this action

and have the true nature of their estate declared. *Satterwhite v. Gallagher,* 173 N. C., 525; *Smith v. Smith,* 173 N. C., 124.

There is nothing in the case of *Triplett v. Williams,* 149 N. C., 394, or the numerous cases that have followed and approved that well considered decision that militates in any way against the construction we place upon this deed.

In *Triplett v. Williams* the Court held that the former cases, recognizing many of the old common-law distinctions concerning the premises and habendum of deeds and their purposes and effect upon each other, should not be allowed to defeat the evident intent of the grantor as disclosed from a perusal of the entire instrument, but there was nothing in those decisions that was intended to interfere with the full operation of the Rule in Shelley's Case on titles coming properly within its principles.

Speaking of the rule and its existence here in *Roberson v. Moore, supra,* the Court said: "It is established by repeated decisions of the Court that the Rule in Shelley's Case is still recognized in this jurisdiction, and where the same obtains, it does so as a rule of property, without regard to the intent of the grantor or devisor."

Coming clearly within the operation of this rule, the instrument, in any aspect of the matter, conveys to plaintiff an estate in absolute ownership, and they are entitled to have the same relieved and protected by proper decree.

There is no error, and the judgment of the Superior Court is

Affirmed.

SEABOARD AIR LINE RAILWAY AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. LESSIE HORTON, DECEASED.

(Filed 2 October, 1918.)

1. Supreme Court—Jurisdiction—Opinion Certified.

After the Supreme Court of this State has certified its opinion and remanded the case to the Superior Court, it is without further jurisdiction except when it is properly before it upon petition to rehear (Rule 52, 174 N. C., 841), and may make no further orders therein.

2. Appeal and Error—Writ of Error—When Granted—Supreme Court.

A writ of error to the Supreme Court of the United States should be applied for to the presiding officer of the State court, under the Federal statute, within three months after the rendition of the judgment or decree complained of, and not to the court.

3. Supersedeas—Ancillary Remedy—By Whom Granted—Supreme Court.

A supersedeas is ancillary to a writ of error, and the former may be granted by the same judge who has granted the latter, or both may be granted by a justice of the Supreme Court of the United States.

4. Certiorari—Supreme Court of United States—By Whom Granted—Supersedeas.

A certiorari, provided as a substitute for the writ of error, is issuable within the discretion of the United States Supreme Court, and not by a justice thereof, and when the application therefor has been granted a supersedeas may issue as ancillary thereto. Sec. 2, ch. 448, U. S. Laws 1916.

5. Supersedeas—State Supreme Court—United States Statutes—Petition to State Supreme Court.

Where an appeal has been remanded and certified to the Superior Court, which presents a Federal question, and which the appellant desires to have reviewed by the Supreme Court of the United States, his procedure should conform to the requirements of the Federal statutes (Laws 1916, ch. 448), and his petition to the State Supreme Court for a supersedeas to stay the execution of the judgment it has certified down will be denied.

PETITION for *supersedeas.*

Cansler & Cansler and Armfield & Vann for petitioners.
Stack & Parker for respondent.

CLARK, C. J. Judgment in this case was affirmed on appeal, 8 May, 1918, and was duly certified down. Subsequently, at August Term, 1918, of Union, the plaintiff in that case moved for judgment against the surety in accordance with the tenor of the *supersedeas* bond and for judgment against the railway company upon the certificate of the Supreme Court. This was opposed upon the grounds (1) that the surety was released from liability on the bond because of the fact that the railroads were placed under the control of the government, and the process could not be levied upon their property while under control of the government; (2) that the railway company had applied to the Supreme Court for a writ of *certiorari*, and no judgment should be rendered pending that application; and (3) that if judgment should be rendered against the surety, execution should be stayed pending the hearing of the petition for *certiorari*. The court overruled these objections and rendered judgment for plaintiff in accordance with her motion. The defendants appealed, but did not perfect the appeal.

Although the judgment of this Court was rendered on 8 May, 1918, the defendants did not file a petition for *certiorari* with the United States Supreme Court until 5 August, 1918, after that Court had adjourned, though it had remained in session until some time in July, for more than

two months after judgment of affirmance; nor did they file their application for *supersedeas* in this Court until 10 September, more than 120 days after said judgment. The correctness of the judgment is not involved in this motion.

We are of the opinion: 1. This Court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. It might have been brought before this Court by petition to rehear, if filed in forty days after the opinion, in compliance with Rule 52 of this Court (174 N. C., 841), but this was not done.

The case could have been taken by writ of error to the United States Supreme Court under the Judicial Code, sec. 237, but under U. S. Laws 1916, ch. 448, sec. 6, ratified 6 September, 1916, the application for writ of error could not be allowed unless applied for "within three months" after the rendering of the judgment or the decree complained of. An application for a writ of error must be made, not to this Court, but to the presiding officer of the same, and, if allowed, a *supersedeas* will be granted by him, or the application must be granted by a judge of the United States Supreme Court, who would issue the *supersedeas* as ancil lary to the writ of error. This has not been done, and the time has elapsed in which the application could be made. The petition relies upon the second clause of section 2 of the aforesaid chapter 448, which provides: "It shall be competent to the Supreme Court, by *certiorari* or otherwise, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause where any final judgment or decree has been rendered or passed by the higher Court of the State in which any decision could be had, where," etc.

It will be seen that such application for *certiorari* could not be made to this Court, but must be made to the United States Supreme Court, which alone can decide whether such application can be granted or not. It will be granted only where sufficient cause, doubtless, is shown why the petitioner had failed to make his application for writ of error in the time allowed by law; or where such writ of error would not lie, it would be a substitute for a writ of error if the Supreme Court in its discretion should think fit to issue it.

But when there is a writ of error the *supersedeas* is granted as ancillary and by the presiding officer of the State Court, or by a judge of the United States Supreme Court, who grants the writ of error. And where the *certiorari* is granted in lieu of a writ of error, this cannot be done by a single judge, but by the United States Supreme Court in its discretion, and that Court alone can grant the *supersedeas*.

In such cases the *supersedeas* is ancillary to the writ of error, or to the *certiorari* issued in lieu thereof, and can be granted only in aid of such

process and by the same authority which grants the writ of error or the *certiorari.*

This Court has no jurisdiction of the matter in controversy; and the remedy of the petitioner, if any, is by application to the United States Supreme Court, which will be in session 7 October, by a motion for *certiorari* to take the case up in lieu of the writ of error, which has been lost by the lapse of the three months, and, if the *certiorari* is granted, by application for a *supersedeas* as ancillary thereto.

This Court is solely an appellate Court, except as to claims against the State; and when a decision on appeal has been rendered and certified, the jurisdiction of this Court is at an end. *James v. R. R.,* 123 N. C., 299; *Finlayson v. Kirby,* 127 N. C., 222; *White v. Butcher,* 97 N. C., 7.

Even if this Court had jurisdiction of this cause, it would have no power to grant a *supersedeas* pending a petition to the United States Supreme Court for *certiorari.* There is no Federal statute and no State statute authorizing such procedure, and no decision of any court has been cited to justify it.

The writ of *supersedeas* is a writ issuing from the appellate court to preserve the *status quo* pending the exercise of the jurisdiction of that court. It issues only to hold the matter in abeyance pending the review of the case, and therefore is granted only by the court which orders the removal of the cause, and is regulated by statute. *Hovey v. McDonald,* 109 U. S., 150.

A case in point in this State is *Bank v. Stanly,* 13 N. C., 479, by *Henderson, C. J.,* who said: "The *supersedeas* should be dismissed, because one court cannot supersede the process of another, however superior the one may be to the other, *but in the exercise of and as ancillary to its revising power.*"

This Court cannot be asked to grant the *supersedeas* as ancillary to its revising power; for, after we have affirmed the judgment below, we have no authority to grant a writ of error or *certiorari* to remove the case from the courts of this State to the United States Supreme Court. We are asked to grant it, not pending the action of a higher court, to which the cause has been removed by this Court, but pending such time as such higher court with right of review shall decide whether or not it will exercise that right. To grant it under such circumstances is unreasonable and unheard of. The *supersedeas* should be issued by that court if it should grant the *certiorari* to remove the cause.

The action of the Superior Court cannot be reviewed, except by appeal. Revisal, 583; *Clothing Co. v. Hay,* 163 N. C., 495.

When a writ of error removing a cause to the Supreme Court has been granted, it is then pending in the United States Supreme Court. In such case, execution cannot be stayed, unless the plaintiff in error files

his writ of error within the legal time after entry of the judgment, for there can be no *supersedeas* if the writ of error is invalid. *Title Co. v. U. S.*, 222 U. S., 401. In this last case the writ of error had been granted, but the *supersedeas* was vacated, because the writ of error was not applied for within the required time.

It is claimed that some of the Federal Circuit Courts have granted a short stay, to enable the party to apply to the United States Supreme Court for *certiorari*. But this does not authorize the State courts to take such action, since the power of the State courts in such case proceeds from the Federal statute alone. Moreover, in the Federal courts the stay was granted for only a few days, and not after a delay of more than two months, during which time the United States Supreme Court was in session.

Motion denied.

E. A. HEATH v. M. D. LANE ET ALS.

(Filed 2 October, 1918.)

1. Clerks of Court—Probate Judge—Statutes, Directory—Deeds and Conveyances—Title.

The law is directory that requires the probate judge of the county wherein the lands lie and the deed registered to pass upon the probate taken by the probate judge in another county, and his failure to have done so does not alone affect the title thus conveyed.

2. Evidence—Title—Common Source—Deeds and Conveyances—Location—Burden of Proof—Nonsuit.

The plaintiff must show his title in his action to recover land; and when he claims a superior title, but under a common source with the defendant, and the cause has been accordingly tried in the Superior Court, he necessarily admits that the *locus in quo* is covered by the defendant's deed from such source, and upon judgment of nonsuit he may not justly complain that the burden of proof was on defendant to show that his deed covered the lands in dispute.

ACTION to recover a tract of land, tried before *Allen, J.*, at February Term, 1918, of CRAVEN.

At the conclusion of the evidence the court sustained a motion to nonsuit, and plaintiff appealed.

W. D. McIver for plaintiff.

Guion & Guion, Moore & Dunn, T. D. Warren, and R. A. Nunn for defendants.

BROWN, J. An examination of the record discloses that plaintiff

failed to make out a title to the land in controversy in any of the recognized methods so clearly pointed out in *Mobley v. Griffin,* 104 N. C., 115.

The plaintiff, failing to show title out of State, and color of title and adverse possession, undertook to estop defendants by showing that they claimed under a common source with plaintiff, and that plaintiff held the better title from such source. It was admitted that Charles A. White was seized in fee of the land in controversy, and that plaintiff and defendant claimed title under him. The plaintiff claims under a deed from C. A. White, dated 2 November, 1891, and recorded 9 March, 1891. The defendants claim under a deed from C. A. White, dated 11 February, 1878, and recorded 26 February, 1878.

The plaintiff contends that the last named deed fails to convey the title as against his deed, because there was no adjudication of probate by the proper officer of Craven County, the original probate having been taken by the probate judge of Pitt County.

The question presented was decided as long ago as 1875, when it was held that the provision of the law which requires the certificate of probate made by the probate judge of one county to be passed on by the probate judge of the county when the deed is to be recorded is only directory, and that a registration upon a probate which has not been so passed upon is valid. *Holmes v. Marshall,* 72 N. C., 38.

It is further contended that the judge erred in sustaining the motion to nonsuit because the burden of proof was on defendants to show that the deed under which they claimed, dated 11 February, 1878, covered the land.

No such point as this appears to have been made on the trial below, and the case was tried out on the theory that both deeds executed by Charles A. White covered the land in controversy, and the contest was as to which deed prevailed. This must necessarily be true, for plaintiff was endeavoring to estop the defendants under Rule 6, as laid down in *Mobley v. Griffin, supra,* by connecting defendants with a common source of title (Charles A. White) and by showing in himself a better title.

To do this, plaintiff was bound to admit that defendants' deed (claimed to be invalid as to registration) covered the *locus in quo.* Unless it covered the *locus in quo,* it could not connect defendants with the common source of title, and it would be idle to attack the validity of the registration and probate of a deed that plaintiff denied covered the land in dispute.

We are of opinion, upon a review of the record, the nonsuit was properly allowed.

Affirmed.

C. C. STALLINGS v. MRS. S. F. SPRUILL.

(Filed 2 October, 1918.)

Judgments—Excusable Neglect—Principal and Agent—Attorney and Client.

Where the defendant in a proceeding to establish the true divisional line between adjoining owners of land is a nonresident of the State, has duly accepted service on the summons in the proceeding, and entrusted the matter to his resident general agent, and it appears that this agent did not employ an attorney, but sent the tenant on the land to attend to the case on the return day of the summons, and this tenant was informed that an answer was required to be filed, the case continued from time to time, and notice given him that judgment would be taken by default if answer should not have been filed by a certain time, and judgment by default was accordingly taken: *Held*, the fact that the tenant did not communicate to the general agent the necessity for filing an answer does not excuse the general agent or the defendant himself from taking the necessary steps in filing the answer, and the judgment may not properly be set aside for excusable neglect.

MOTION to set aside a judgment rendered by the Clerk of the Superior Court of HALIFAX County, heard by *Kerr, J.*, at January Term, 1918, of said county.

The court set aside the judgment upon the ground of excusable neglect. Plaintiff appealed.

R. C. Dunn and Murray Allen for plaintiff.
George C. Green and J. P. Pippen for defendant.

BROWN, J. This is a processioning proceeding to determine and establish the true division line between the lands of plaintiff and defendant. It was returnable before the clerk 12 December, 1916. The complaint was filed, duly verified, on 4 December, 1916. On return day defendant failed to answer, and the cause was continued from time to time to permit defendant to file answer, and until 29 January, 1917, when the clerk, upon motion of plaintiff, rendered judgment for failure of defendant to file answer.

It appears from the findings of fact that the summons was given to M. C. Braswell, general agent for defendant, who is a resident of New Jersey. Braswell sent summons to defendant, who admitted service in writing on the back and sent it to Braswell, who sent it to R. C. Dunn, plaintiff's attorney.

Braswell did not employ an attorney for defendant, but sent J. B. Laughter, the tenant on the land, to Halifax on 12 December, 1916, the return day of the summons, to attend to the case.

The Court finds further that on the date the clerk informed Laughter that it would be necessary that an answer be filed, and that after the

answer was filed the county surveyor would be sent out to the land to run the respective contentions of the plaintiffs and the defendant, and that thereafter the court would hear and examine the true line; that this fact was communicated to Braswell by Laughter. The action was continued from 12 December until a later date, and Laughter was informed by the clerk that it was necessary for the defendant to file an answer; that on said later date the plaintiffs appeared by their attorney, and Laughter also appeared. No answer having been filed, the action was again continued, and Laughter was informed by the clerk and by plaintiff's attorney that it would be necessary that an answer be filed by the defendant and that as no answer was filed, the cause was again continued, by consent of the plaintiff's attorney, until 29 January, 1917, the attorney notifying Laughter that unless answer was filed by 29 January, 1917, he would move the court for judgment establishing the line between the plaintiffs and the defendant as set out in the petition of the plaintiff. This was not communicated to Braswell by Laughter. The further fact is found that Braswell has for years been attending to the business of Mrs. Spruill in North Carolina, and she expected him to employ an attorney to represent her, and that Braswell would have attended to said matter but for the fact that Laughter incorrectly reported to him what the clerk had said.

This is such a clear case of inexcusable neglect that the learned counsel for defendant are frank enough to say in their brief: "There is no question about the fact that M. C. Braswell, agent of the defendant in this action, has been guilty of neglect, but the defendant contends that this neglect is excusable and not imputable to the defendant in this action. The defendant in New Jersey has been entrusting her affairs to M. C. Braswell for a period of twenty-five years, and he has always promptly and efficiently attended to her affairs, and she has a right in this instance to rely upon the continuation of the same faithful and efficient service which he has always rendered."

They cite no authority for their contention that the negligence of Braswell, a general agent, is not imputable to his principal, the defendant. On contrary, we find it to be settled in this State that the inexcusable neglect of an agent will be imputed to the principal in a proceeding to set aside a judgment by default. *Norwood v. King,* 86 N. C., 80; *Norris v. Insurance Co.,* 131 N. C., 212.

There have been cases where the negligence of attorneys at law has been imputed to the client (*Hardware Co. v. Buhmann,* 159 N. C., 511), but it is not generally so. Where the party to an action employs a reputable attorney and is guilty of no negligence himself, and the attorney fails to appear and answer, the law will excuse the party and afford relief. This is because attorneys are officers of the court and can do for

a client that which the client cannot do for himself. Therefore, the courts sometimes relieve the clients from the consequences of the attorney's negligence. This subject is fully discussed by *Mr. Justice Allen* in the recent case of *Seawell v. Lumber Co.*, 172 N. C., 324, and the authorities cited. But Braswell is not an attorney. He is an extensive planter and business man in the adjoining county of Edgecombe.

It was his duty to employ an attorney to appear and answer for Mrs. Spruill. Instead he sent Laughter, the tenant on the land, to attend to a matter in court requiring the services of an attorney "learned in the law."

The clerk, with consent of plaintiff's counsel, continued the cause repeatedly, notifying Laughter, who was in attendance, to have an answer filed.

It was gross negligence on part of Laughter not to inform Braswell of this, and it was negligence on part of Braswell not to inquire of Laughter or the clerk as to the disposition of case.

The defendant is not herself free from negligence. She admitted service of the summons on 16 November, 1916, and paid no further attention to the case and made no inquiries concerning it until after 29 January, 1917, when judgment by default had been rendered.

We are of opinion the judge erred in setting aside the judgment.

Reversed.

JAMES M. HINES v. WILEY P. NORCOTT.

(Filed 2 October, 1918.)

1. Contracts — Lessor and Lessee — Municipal Corporations — Ordinances—Statutes—Sewers—Health.

Where an ordinance of a town, in pursuance of its municipal powers, makes the use and maintenance of surface privies unlawful upon lots abutting upon a street wherein a sewer-pipe has been laid, and requires the owners of such lots to connect with the sewer by a certain date, providing a penalty for its violation, the courts will examine the ordinance to ascertain the intent of the municipal authorities in passing it; and the validity of a contract of lease of premises adjoining a street wherein the pipe had been laid is not affected by the fact that the owner thereof has failed to comply with the ordinance, there being nothing in the lease transaction immoral *per se*, or inhibition in the contract of lease against making the connections required.

2. Same—Suitable Premises—Trials—Questions for Jury.

The owner of a lot in a town contracted to lease a part of a building to be erected by him thereon, providing among other things that the building should be "a suitable one," and after its completion the lessee entered upon

the leased premises and occupied the same without objection. Thereafter, an ordinance of the town required the owner of the building, under penalty, to connect with a street sewer, which he failed to do. The ordinance being interpreted as not affecting the contract, it is held that the lessee's right to annul the lease was properly made to depend upon the question of fact whether the building was a suitable one within the intent and meaning of the contract.

ACTION tried before *Allen, J.*, and a jury, at May Term, 1918, of PITT.

The plaintiff sued for rent due under a lease, made 13 November, 1913, by him to the defendant, for four stores and a hall in a building to be erected in the town of Greenville, at $12 per week, for a term of five years. At the completion of the building, in March, 1914, the defendant entered into possession and occupied the premises for about fourteen months, paying the rent regularly according to the terms of the lease, up to 12 April, 1915. The building was to be of brick and "a suitable one."

The defendant denied liability, and, by amendment to his answer, which was allowed by the court, he pleaded that the contract was unlawful and unenforcible, as being in violation of the following ordinance of the town of Greenville, passed in April, 1914, after the lease was executed and the defendant had taken possession of the tenement: "Whereas the maintenance and use of surface and dry privies in the town of Greenville is or may become a menace to the public health of the town: Now, therefore, be it ordained by the Board of Aldermen of the Town of Greenville in regular meeting assembled on 2 April, it shall be unlawful for any person, firm, or corporation to erect, maintain, or use any surface or dry privies upon any lot or premises in said town, abutting on any street wherein a sewer-pipe has been laid; and that all owners of said property shall connect with said sewer on or before 1 June, 1914. Any person violating the provisions of this ordinance shall be fined $5 for each offense, and each day said violation shall continue shall constitute a separate offense."

There was evidence to the effect that the plaintiff, at the time of making the lease, and afterwards, had promised to install a plumbing and sewerage system on the premises, connecting with the main sewer line on Cotanch Street, which is in front of the building, but that this was not done. Plaintiff denied that he made any such promise, or that anything was said about it. The upstairs was to be used for a dance hall; the lower story was to be used for a pool-room, a barber shop, a cafe, and a drug store, one in each of the four rooms.

Plaintiff testified that defendant paid the rent up to 12 April, 1915, and there is nothing charged after 31 May, 1915, and that defendant quit the premises in 1915.

The defendant requested that the following instructions be submitted to the jury:

1. As it is admitted that plaintiff did not put in sewerage as required by the ordinance of the town of Greenville, the plaintiff cannot recover on said contract since 1 June, the date said ordinance became effective.

2. As plaintiff admits the rental account has accrued since 12 April, 1915, and since that time he has been renting the building in violation of the ordinance, he cannot recover.

3. If you find from the evidence that plaintiff rented the building in violation of the ordinance, then he cannot recover in this action.

These instructions were all refused, and defendant duly excepted.

The court charged the jury as follows: "This action, as you will understand, is brought by the landlord, Mr. Hines, against the defendant for an amount which he claims to be due for his building which he rented. The only issue submitted to you is as to what amount, if any, is due the plaintiff by the defendant, the plaintiff claiming that he is due the sum of $113, and the defendant claiming that he is entitled to a counterclaim, or set-off, for failure to put in certain sewerage. The first question to be considered is whether that was agreed upon, and whether it was necessary to make it a suitable building. You will remember the agreement that he was to provide a suitable building, and there was a controversy there, the plaintiff contending that it was a suitable building without sewerage, and the defendant contending that it was not a suitable building without sewerage, and that by reason of the failure to so provide sewerage he has been damaged to the amount of $10 per month, which, he says, amounts to about $100. So the first question would be as to whether it was a suitable building without sewerage for the purpose for which it was being erected and used; and if you find it was suitable without it, then he would not be entitled to a counterclaim. If you find that it was not suitable, then you will further find whether he was damaged by reason of the failure, and deduct from the amount due to the plaintiff, which plaintiff says is $113, the amount of such damage as you find. I shall not hold that by reason of not complying with the town ordinance the plaintiff cannot recover, and I charge you not to consider that, it being a question between him and the town authorities as to whether they would make him close his business or comply with the ordinance. It would not affect this suit. So you consider what amount is due the plaintiff, if any, under the contract, and whether or not he erected a suitable building; and if he did, then he would be entitled to the full amount; and if he failed to do so, then you would deduct whatever amount you find he has been damaged by reason of the failure in making it a suitable building."

Defendant, in proper manner, excepted to the charge, and assigned several errors.

The jury returned the following verdict:

1. Is the defendant indebted to the plaintiff? If so, in what amount? Answer: $113.

Judgment upon the verdict, and defendant appealed.

F. C. Harding for plaintiff.
Julius Brown for defendant.

WALKER, J., after stating the case: The defendant contends that there can be no recovery against him in this case because the lease is an illegal contract, being violative of the ordinance of the town of Greenville, which we have copied in the statement of the case. For the purpose of deciding whether a contract is in contravention of a statute or ordinance, and void for that reason, we are at liberty to examine the statute and ascertain what was the legislative intent, and whether it was the purpose to avoid the contract alleged to be contrary to its provisions, or whether it was intended that the penalty alone should be a sufficient punishment. The Court, by *Justice Wayne,* held, in *Harris v. Runnels,* 12 Howard, 79 (13 L. Ed., 901), after stating the English rule: "Such we believe to be now the rule in England, but with many exceptions, made upon distinctions very difficult to be understood consistently with the rule—so much so, that we have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only, for doing a thing which it forbids, that the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the Legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it. When the statute is silent and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. It is not necessary, however, that the reverse of that should be expressed in terms to exempt a contract from the rule.

The exemption may be inferred from those rules of interpretation, to which, from the nature of legislation, all of it is liable when subjected to judicial scrutiny. That legislators do not think the rule one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute there is no prohibition expressed, and only a penalty; in another there is prohibition and penalty, in some of which contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions in which contracts made in contravention of them will not be void unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

In *Dunlop v. Mercer*, 156 Fed. Rep., at p. 556, the Court follows the rule laid down in *Harris v. Runnels, supra,* and thus comments upon it: "The rule announced in this case has been repeatedly applied by the Supreme Court, notably in *Fritts v. Palmer, supra,* and the cases cited in that opinion, and has become an established canon of interpretation in the national courts. The true rule is, that the court should carefully consider in each case the terms of the statute which prohibits an act under a penalty, its object, the evil it was enacted to remedy, and the effect of holding contracts in violation of it void, for the purpose of ascertaining whether or not the lawmaking power intended to make such contracts void; and if from these considerations it is manifest that the Legislature had no such intention, the contracts should be sustained and enforced; otherwise, they should be held void," citing cases, and among them *Fritts v. Palmer,* 132 U. S., 287 (33 L. Ed., 317). See also 6 Ruling Case Law, sec. 109, and cases in note 20 to the text; 13 Corpus Juris, pp. 422 and 423, sec. 352, and note 84 (a) to text; *Levison v. Boas,* 150 Cal., 185 [*S. c.,* 12 L. R. A. (N. S.), 575], and elaborate note; *Neimeyer v. Wright,* 75 Va., 239; *Union & Mining Co. v. R. M. Nat. Bank,* 96 U. S., 640 (24 L. Ed., 648); *O'Hare v. Bank,* 77 Pa., 96.

The case of *Harris v. Runnels, supra,* is analogous to our case, for there the suit was upon a promissory note given for slaves carried into Mississippi and sold there, in violation of a statute of that State which prohibited their sale without a certificate. The Court sustained a recovery upon the note against a plea that it was given in violation of the law. In the case under consideration the ordinance, which is entitled "Dry or Surface Privies," declares that they are a menace to the public

health of the town; forbids that they be erected, maintained, or used upon any lot, or premises, abutting on any street wherein a sewer-pipe has been laid, and requires that "The owners of said property shall connect with said sewer on or before 1 June, 1914." There is nothing there said, expressly or impliedly, to the effect that leases of such premises shall be void, but the ordinance only provides for a penalty of $5 for each day's violation of its provisions. The imposition of a penalty for not doing an act which is required to be done may of itself render the doing of the same illegal; but still, if upon a fair construction of the statute it appears to have been the intention of the legislative body to confine the punishment or forfeiture to the penalty prescribed for a violation of it, that intention will be enforced. And the same may be said as to the prohibition of an act, but it does not follow in either case that the illegal act will vitiate a contract which is connected with it only incidentally because it relates to property affected, in some degree, by the statute or ordinance prohibiting or enjoining the act and annexing a penalty for its violation. This ordinance was intended to forbid the "erection, maintenance, or use of surface or dry privies" in the town, and required, in order to prevent any injury to the public health, that they should be connected with sewer-pipes laid in a street adjoining the premises. The lease in this case did not refer at all to the subject-matter of the ordinance, and especially did not stipulate that no such connection should be made, or that such privies should or might be used on the premises. The town council, in passing the ordinance, surely did not have in mind the prohibition of a lease or sale of the premises, but only the punishment by way of penalty for the violation of its ordinance. The Court said, by *Justice Harlan*, in *Fritz v. Palmer*, *supra*, at p. 288: "It may also be assumed, for the purposes of this case, that this company violated the law of that State when it purchased the premises here in controversy without having, in the mode prescribed by the statutes of Colorado, previously designated its principal place of business in that State, and an agent upon whom process might be served. But it does not follow that the title to the property conveyed to the Comstock Mining Company remained in Groshon, notwithstanding his conveyance of it to that company in due form and for a valuable consideration." And in *Dunlop v. Mercer*, *supra*, *Judge Sanborn*, in referring to that case, said: "The Supreme Court held that the deeds were illegal, but that they were valid, and that they conveyed the property, and it sustained the title on the ground that the imposition of the penalty of the personal liability of the officers and stockholders, without any imposition of the penalty that contracts and deeds in violation of the statute should be void indicated that the Legislature did not intend to make and did not make such deeds and contracts void by statute." And again: "The object of it was not to

prohibit or to avoid contracts of foreign corporations for the sale of merchandise. The evil which the Legislature sought to remedy was not the making or the performance of such agreements. Such contracts were not deleterious to the citizens or to the State, but they were beneficial to both. The purpose of the Legislature was to subject foreign corporations doing business in the State to the process of its courts, and perhaps to a license tax. . . . The effect of the statute was to provide that if such a corporation would not subject itself to the process of the courts of the State, it should not be permitted to resort to such courts for relief, and it should pay a penalty of $1,000. There is no declaration in the statute that contracts of unqualified corporations doing business in the State without complying with the prescribed conditions shall be void."

It cannot be supposed, upon a proper reading of this evidence, that the council intended to invalidate leases and sales of property merely because the owner of the premises had failed to make the sewer connections, and it is to be noted that nothing in the case shows that there were any dry or surface closets on the premises, or anything else that would "menace the public health." The jury have found, when we interpret the verdict in the light of the evidence and the charge, that the building was suitable, within the meaning of the contract, for all the purposes of the defendant, under a charge which required the jury to find, before deciding for the plaintiff, that the building was suitable without sewerage, that being the controversy between the parties. If the council intended to invalidate leases or sales of the property until the proper sewer connections were made, if there were dry or surface closets on the premises, it was very easy to say so; but that was not the purpose, as the council manifestly intended that the ordinance should provide only for a penalty for erecting, maintaining, or using such closets without having made the connection after the date named therein. The lease was entirely collateral to and independent of the object for which the ordinance was enacted, as the cases already cited by us clearly demonstrate. It would be pressing the ordinance by forced construction beyond its proper and intended scope to hold that it was fairly within the contemplation of the council to destroy contracts made with reference to the premises described in the ordinance, especially when the leasing and conveying of property is of itself perfectly legal, and the freedom of such traffic exchanges is in large measure beneficial to the public interests, and contributes to the prosperity of the town. Such a holding is not required by public policy, and the consequences of it to legitimate interests repels the idea that it was intended by the council that the ordinance should embrace such sweeping forfeitures. *Union & G. M. Co. v. R. M. Nat. Bank, supra.*

There is nothing in this record to show that the evil recited in the

ordinance as affecting the public health existed in this instance, or that the premises could not be occupied safely without the sewer connections.

The case of *Courtney v. Parker*, 173 N. C., 479, does not conflict with our decision, and is not an authority in support of the defendant's contention. There the defendant had done the very thing which was, in express terms or by the clearest implication, forbidden by the statute, and which it was unlawful to do, and every time he made a sale in the same manner, he did the same thing which the statute was intended to prohibit, and which it declared should be unlawful and a misdemeanor, punishable by fine and imprisonment. In other words, the statute declared that he should conduct his business in a certain way, and not otherwise, and that he should not conduct it at all "unless" he complied with the provisions of the statute. He did not pursue the prescribed method, but the one denounced, and his act was therefore held to be illegal and his contract tainted by it. That is not our case.

There is nothing in the lease transaction which is immoral *per se*, and therefore it is our right to search out the intention of the council and the meaning of the ordinance, in the language of the latter, and discover, if we can, what was its purpose, and not destroy contracts, with perhaps disastrous results, unless we find that to have been the real meaning and object in view. *Courtney v. Parker, supra,* and cases cited therein. The ordinance does not, in terms or by implication, forbid the sale or leasing of premises having no sewer connections, but is restricted to the injunction that in certain instances the owner should make such connections under a penalty for his failure to do so. There is no inhibition in this contract against the making of such connections, and the owner is perfectly free to make them at any time. There is not even a reference to the matter, one way or another.

The learned judge decided correctly upon the validity of the contract.

No error.

I. M. MEEKINS v. JAMES SIMPSON.

(Filed 2 October, 1918.)

1. Animals—Dogs—Property—Statutes—Actions.

While, at common law, dogs were not considered as having such pecuniary value as to make them subjects of larceny or to be classed and dealt with as estrays; and while they are not now to be regarded as "stock," within the meaning of our statute (Revisal, sec. 1681) as to impounding stock, their position, as to larceny, has been changed in reference to listed and tax-paid dogs, and it is held that they are so far the subjects of property as tame domestic animals of value, that the ordinary civil remedies are available to the owners, and they may maintain an action to recover them.

2. Same—Limitation of Actions.

The finder of lost property, a dog in the present instance, as a bailee without compensation, holds for the benefit of the owner, when ascertained, and the statute of limitations in bar of recovery of the possession will not commence to run against the true owner until demand and refusal, or the exercise of some unequivocal act of ownership inconsistent with the true owner's right, especially where the finder of the property may have found the true owner by the exercise of reasonable diligence, and has testified he was holding the property for him.

3. Assumpsit—Lost Property—Liens—Evidence.

While the finder of lost property may sustain a demand in *assumpsit*, or by way of counterclaim, for the reasonable costs and expenses necessary to the preservation and return of the property to the true owner, no lien attaches to the property therefor, especially in the absence of an offer of reward for its return; and where the title to the property is the sole issue, evidence as to such costs and expense are properly excluded.

4. Same—Dogs—Animals.

While the finder of a lost dog may recover of the owner such reasonable costs and expenses as he may have incurred therein, the demand should not be readily allowed without clear evidence of particular existing conditions which would warrant it.

ACTION to recover a bird dog, tried on appeal from a justice's court before *Kerr, J.*, and a jury, at February Special Term, 1918, of PASQUOTANK.

The evidence tended to show that in 1912 plaintiff lost a pointer dog named Bingo; that he searched and advertised for him without success and had no knowledge of his whereabouts till a week before the suit commenced when he ascertained that the dog was in the possession of defendant; that he then sent to the home of defendant and demanded possession of the dog, and defendant refused to restore him unless he was paid the sum of sixty dollars for the keep of the dog. Whereupon plaintiff instituted suit.

Defendant testified that some time in January, 1912, the dog came to him as he was going along the road and followed witness to his brother's, two or three miles from Elizabeth City; stayed there a week, and defendant then took the dog home with him, seventeen or eighteen miles out, and he had since been with defendant, going about with him openly; that about three months after taking the dog home defendant learned that Mr. Meekins had lost a dog and told one Armstrong he had a dog, described it and was told that it was Mr. Meekins's dog; that witness asked Armstrong to tell him, and himself went to Meekins's office, but failed to find him in. It appeared further that Armstrong had never delivered plaintiff's message. The summons put in evidence bore date September, 1917.

On denial of plaintiff's ownership and plea of the statute of limitations, the jury rendered the following verdict:

Is plaintiff the owner and entitled to possession of the dog sued for? Answer: "Yes."

Is plaintiff's action barred by the statute of limitations? Answer: "No."

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error:

"That the court excluded evidence offered by defendant as to worth of the care and keep of the dog while defendant had him."

The charge of the court on the issues: "That if the jury believed the evidence and found the facts to be as testified by the witness, they would answer the first issue 'Yes' and the second issue 'No.'"

Meekins & McMullan for plaintiff.
Aydlett, Simpson & Sawyer for defendant.

HOKE, J. The rules of the common law concerning the ownership of dogs are not as consistent and definite as in most other kinds of property. Owing, probably, to the very great variety of species, as well as the differences in their dispositions and habits, they were not considered as having such pecuniary value as to make them subjects of larceny, and for the same reason they were never classified or dealt with as estrays within any recognized meaning of that term. 1 Blk., pp. 297-298. And it may be well to note that they are not now to be regarded as "stock" within the rules for impounding stock under our present statute applicable. Revisal, sec. 1681.

The position as to larceny has been changed by statute in reference to listed, tax-paid dogs. Revisal, sec. 3501. And it has been very generally understood and held, both in old and in later cases, that dogs are so far the subjects of property that the ordinary civil remedies are available to the owner for their protection, and in this respect the trend of the modern decisions is to regard dogs as tame domestic animals having value. *Dodson v. Mock,* 20 N. C., 282; *Graham v. Smith,* 100 Ga., 434; *Tar Hopen v. Walker,* 96 Mich., 236. The action is therefore well brought, so far as the form is concerned, and on perusal of the record we find no reason for disturbing the verdict and judgment by which the rights of the owner have been established.

Assuming in the present instance that the dog was really lost and is subject to the principles that usually prevail in reference to lost property, it is the recognized position that the finder, as a bailee without compensation, holds for the benefit of the owner when ascertained, and that no statute of limitations will inure for his protection unless and

until the possession of the finder has become adverse to that of the owner, and this must be established by a demand and refusal of the owner or by the exercise of some unequivocal act of ownership inconsistent with the true owner's right. Until that occurs, no cause of action has accrued to the owner and, by express provision, the statute of limitations does not begin to run. Revisal, sec. 360; *Smith v. Durham,* 127 N. C., 417; *Earp v. Richardson,* 81 N. C., 5; *Carroway v. Burbank,* 12 N. C., 306; 17 R. C. L., title, Lost Property, sec. 7, p. 1205. Not only is there no evidence of such an act in the present instance, but defendant, a witness in his own behalf, testified that he was holding the dog for the true owner.

In *Blount v. Parker,* 78 N. C., 128, a case of lost bonds and very much relied on by defendant, there had been a sale and disposition of the bonds by the finder nearly ten years before action brought, and the case was decided for defendant on that ground. The case is chiefly an authority for the position that when there had been such an exercise of ownership by the finder, amounting to an undoubted conversion, the fact that the true owner was ignorant of it would not prevent the bar of the statute in a purely legal action, and is rather in illustration of the principle we apply to the present case. It may be well to note that the headnote in *Blount v. Parker* is calculated to give the impression that the sale and conversion of the bonds took place a short time before action brought. An examination of the record, however, shows the facts to be as stated. And in *University v. Bank,* 96 N. C., 280, there had been a demand and refusal by the rightful claimant more than three years before action brought. Nor is there any error in excluding the evidence offered as to the amount due for the keep and maintenance of the dog while in defendant's possession. While it is recognized that a finder of lost property may sustain a demand in assumpsit or by way of counterclaim for the reasonable cost and expenses necessary to the preservation and return of the property to the true owner, it is very generally held, universally so far as examined, that there is no lien for any such claim, therefore this proposed testimony was not relevant to an issue as to title or right of possession. Such lien seems to be allowed in case of a reward offered, but not, as stated, for expense of preservation and maintenance. *Weeks v. Hackett,* 104 Me., 264, reported also in 129 Amer. St., 390; *Wood v. Parson,* 45 Mich., 313; *Amory v. Flyn,* 10 Johnson, 102; *Chase v. Corcoran,* 106 Mass., 286; *S. v. Hayes,* 98 Iowa, 619, reported in 37 L. R. A., 116, and *Bunstead v. Buck,* 2 Black, W. 1117; 96 English Reprints, 660.

An examination of these authorities and others of like kind will disclose that the right of recovery will arise to the finder under the general equitable principles of indebitatus assumpsit and under circumstances

where a request for the expenditures claimed may be reasonably inferred. *Chase v. Corcoran, supra.*

This being the principle, a demand of this kind should not be readily allowed in case of a lost dog, and unless he gave very clear evidence of being spent by hunger or fatigue, and assuredly no such claim could for a moment be sustained on the facts of this record, where the dog was first "found" within a few miles of the owner's home and with no proper or adequate effort afterwards made to ascertain who the owner was.

There is no error and judgment for plaintiff is

Affirmed.

T. B. OAKLEY v. L. G. MORROW AND G. E. MOORE, PARTNERS, TRADING AS L. G. MORROW & CO.

(Filed 2 October, 1918.)

Partnership—Principal and Agent—Contracts—Intent—Estoppel.

Where the partnership relation of a firm for a certain year has been established (see *Machine Co. v. Morrow*, 174 N. C., 198), the acts of one of the partners during that term, within the scope and exegencies of the current business, is binding upon the other; and where labor has accordingly been done for the partnership and money lent thereto by an employee, under agreement with the partner in charge of the business, the existing contract of partnership will control, and the mere knowledge of such employee at the time that the other partner intended to withdraw from the firm, without any element of estoppel, will not release the partner so intending from liability.

ACTION tried before *Whedbee, J.*, and a jury, at August Term, 1918, of PITT.

The action was to recover $1,700, claimed by defendant for services rendered and money advanced to the firm of L. G. Morrow & Co., conducting a tobacco warehouse business at Farmville, N. C., in 1914; plaintiff contending that said firm at the time was composed of L. G. Morrow and G. E. Moore.

There was denial of liability on the part of defendant Moore, said defendant contending that he was not a partner in said firm and in no way responsible for the claim.

On issues submitted, the jury rendered the following verdict:

1. Were the defendants, L. G. Morrow and G. E. Moore, during the year 1914, partners, doing a general tobacco warehouse business in the town of Farmville under the firm name of L. G. Morrow & Co., as alleged? Answer: Yes.

2. If so, was the defendant G. E. Moore, at the time of the making of the account in controversy, a partner of the firm of L. G. Morrow & Co.? Answer: Yes.

3. Is the defendant G. E. Moore, as a partner of L. G. Morrow & Co., indebted to the plaintiff, and, if so, in what amount? Answer: Yes; $1,669.07, with interest from 22 December, 1915.

Judgment on the verdict, and defendant G. E. Moore excepted and appealed.

F. G. James & Son for plaintiff.
Albion Dunn for defendant.

HOKE, J. There was evidence tending to show that in 1914 Morrow & Moore, a firm, composed of L. G. Morrow and G. E. Moore, undertook to dissolve the partnership between them, and entered into a written agreement, signed by both of the parties, reciting among other things that "The said L. G. Morrow and G. E. Moore do hereby covenant one with another that they will be bound by the following terms, agreements, and stipulations, so far as the same affects any existing relationship between them."

Construing this contract, in *Machine Co. v. Morrow,* 174 N. C., 198, the Court held that its force and effect was to constitute a partnership between these persons for the year 1914, and, this being true, his Honor correctly held that the defendant Moore, as a member, was liable for plaintiff's claim for services to the firm and money lent them during said year in promotion and within the scope and exigency of its current business. *Farmer et al. v. Head & Co.,* 175 N. C., 273; George on Partnerships, p. 97.

The evidence offered by defendant Moore in opposition to the recovery, and which was disregarded in the court below, amounts only to this, that it was the desire and intent on the part of said defendant to withdraw from the firm, but, having entered into a binding written agreement that fixed his relationship and status to be that of partner for one year longer, the intent and meaning as expressed in the terms of the written agreement while it remains in force must control the rights and liabilities of the parties, as presented in this record, and may not be varied by the intent or understanding of one of them. *Walker v. Venters,* 148 N. C., 388; 10 R. C. L., title, Evidence, secs. 210-211, p. 1019. Nor is the position affected by the testimony on the part of defendant tending to show that plaintiff was aware of the purpose of defendant Moore to withdraw from the firm. The decision construing the contract having declared defendant Moore a general partner, having an interest in its business and entitled to share in its profits, and conferring on L. G. Morrow, the man-

aging partner, full power to make the contract, the defendant is liable during the period covered by the agreement for all contracts made by him within the ordinary and usual scope of the partnership business and in furtherance of its interests. The contract in question here was for labor performed and money lent to the firm during the year to enable it to carry on its ordinary business, and, in the absence of any facts or circumstances creating an estoppel, defendant is liable by reason of his position as member of the firm, and whether plaintiff knew of his effort and purpose to withdraw or not. *Johnston, etc., v. Bernheim*, 86 N. C., 339.

The case of *Sladen v. Lance*, 151 N. C., 492, is not opposed, but in direct recognition of the principle. That was the case of a partnership which, by its terms, imposed special restrictions on the power of the partner who made the contract, and it was held that a creditor selling to the firm with knowledge of these restrictions was bound by them; but in our case, as stated, the defendant is a general partner; the contracts were made with a member having full powers, and the firm has received full consideration.

There is no error, and judgment for plaintiff must be affirmed.

No error.

JENNIE SULTAN v. PENNSYLVANIA RAILROAD COMPANY.

(Filed 2 October, 1918.)

1. **Railroads — Negligence — Evidence—Sleeping Cars, Pullman—Nonsuit—Trials.**

   Where it is alleged—and plaintiff's evidence tends to show—that the damages sought in an action against a railroad company was caused by the defendant's failure to furnish sleeping-car accommodation, a ticket for which the plaintiff had bought and paid the defendant's proper agent, a motion for judgment as of nonsuit is properly denied.

2. **Pleadings — Evidence—Variation — Railroads—Sleeping Cars, Pullman—Appeal and Error—Prejudicial Error.**

   Where there is general allegation and evidence that the plaintiff was made sick, etc., by the failure of the defendant railroad company to provide sleeping-car accommodation between Washington and Richmond, on transportation to a town in this State, for which its agent at Baltimore had issued a Pullman ticket, it is reversible error for the trial judge in this State, without amendment of pleadings, to reopen the case after the close of the evidence, and allow further evidence to be introduced in plaintiff's behalf tending to show that the station agent in Baltimore refused to allow the plaintiff to take an earlier train from Baltimore, which would have put him in Washington in time to make connection with the train on which his reservation had been made, and which had left before his

arrival there, the effect being to substitute a new cause of action for that alleged, and to the defendant's substantial prejudice.

3. Instructions—Issues—Consolidated Actions—Evidence—Contradictions—Appeal and Error—Reversible Error.

Where two actions are consolidated and tried together, by consent, and submitted to the jury on one set of issues, and the evidence in one of these actions, as to the negligence alleged and the damages, is materially different and contradictory of the evidence in the other action, a charge to the jury thereon, without distinction, is reversible error.

CLARK, C. J., and HOKE, J., dissenting, without opinion.

APPEAL by defendant from *Allen, J.*, at February Term, 1918, of CRAVEN.

These two actions, consolidated and tried together, by consent, were brought against the Pennsylvania Railroad and the Pullman Company by Nita Williams and Jennie Sultan to recover damages because of failure to provide each of the plaintiffs a berth on a Pullman car from Washington, D. C., to Goldsboro, N. C.

The evidence for the plaintiffs tended to prove that they were in Baltimore on business on 16 February, 1917, and on that day bought of the agent of the railroad a railroad ticket to New Bern, N. C., to be used on the night of 17 February, and at the same time bought a Pullman berth from Washington to Goldsboro, on car R-30; that they went to the station at Baltimore about 6:30 o'clock on the evening of the 17th, but did not reach Washington until after the car on which they had bought a berth had left for Richmond; that they continued their journey to Richmond on a Pullman, having a section to themselves, which was not, however, made up for sleeping, and that at Richmond they were given their berths on car R-30; that they suffered humiliation, inconvenience, caught cold, etc.

The evidence for defendants tended to prove that berths were reserved for the plaintiffs on car R-30; that the plaintiffs did not get the berths at Washington because they were not there before the leaving time of car R-30, which was 9:30 o'clock, and that five or six trains left Baltimore for Washington after 6:30 o'clock, when the plaintiffs said they reached the station in Baltimore in time to have taken the plaintiffs to Washington before car R-30 left.

The evidence then closed, and there was a motion for judgment of nonsuit, which was allowed as to the Pullman Company and denied as to the railroad, and the defendant railroad excepted.

The plaintiff then asked the court to reopen the case and permit the examination of the plaintiffs about the gateman at the railroad station in Baltimore refusing to let them through the gate at Baltimore.

The court reopened the case, to which ruling the Pennsylvania Rail-

road Company objected and excepted, and Miss Jennie Sultan then testified:

"We went down to the station to get our train, and went to the gate about 6:30 to get our train. The man at the gate looked at our tickets and told me the train was late. We went to the gate two or three times, until there came a train, and he told us that was our train; that is the train we took. We remained there, watching the gateman. He told us what gate we were to go through. We waited there an hour and a half.

"I knew there were a number of trains going to Washington. I went to the man two or three times with that knowledge. I knew this ticket was good to Washington. We could have gone to Washington on any one of those trains if we could have gotten through the gate."

The defendant excepted to all of this evidence.

The jury returned the following verdict:

1. Did the plaintiff purchase from the defendant railroad company a ticket which entitled her to transportation over its lines and its connecting lines from Baltimore to New Bern, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, at the same time, purchase from said railroad company a ticket which entitled her to a berth upon a car of the Pullman Company from Washington City to Goldsboro, as alleged in the complaint? Answer: Yes.

3. Did the defendant railroad company negligently fail to furnish the plaintiff the berth on the Pullman car from Washington City to Richmond, Va., and damage and injure the plaintiff, as alleged in the complaint? Answer: Yes.

4. What damage, if any, is plaintiff entitled to recover? Answer: $150.

Judgment was entered in favor of the plaintiffs, and the defendant railroad appealed.

D. L. Ward for plaintiffs.
Moore & Dunn for defendant.

ALLEN, J. The motion for judgment of nonsuit could not have been allowed, because the evidence of the plaintiffs, unexplained by the evidence of the defendant, shows a failure to furnish berths from Washington to Goldsboro, as the defendant had agreed to do, which is the cause of action alleged in the complaint, and, "On motion for nonsuit, only the evidence of the plaintiff, and that in the light most favorable to him, can be considered." *Smith v. Electric Co.*, 173 N. C., 493.

The plaintiffs were, however, impressed by the evidence of the defendant tending to prove that five or six trains left Baltimore after they

reached the station, in time for them to go to Washington and take their berths; and knowing that this evidence, if accepted by the jury, would defeat a recovery if they had the opportunity to take these trains, they asked, after the close of the evidence, that the case be reopened, and they were permitted, under these conditions, to offer evidence that the gateman at Baltimore would not permit them to take the earlier trains—a cause of action entirely different from the one alleged in the complaint, and one which placed the defendant at a decided disadvantage, as the action was being tried in New Bern and the evidence of the gateman, which might have been used in rebuttal of the evidence of the plaintiffs, was at Baltimore, more than 300 miles distant.

This evidence of the plaintiffs was objected to by the defendant, and we must hold it was incompetent because not supported by any pleading, because "It is a settled maxim of law that proof without allegation is as unavailable as allegation without proof." *McCoy v. R. R.*, 142 N. C., 386.

"A defendant is called upon to answer the accusations made against him, but he is not called upon, and it would be unreasonable to do so, to anticipate and come prepared to defend any other accusation" (*Moss v. R. R.*, 122 N. C., 891)—a principle intended to give both parties a fair and equal opportunity to be heard, which is not enforced when it appears that the party has not been misled by the variance (*Watkins v. Mfg. Co.*, 131 N. C., 536), but which is peculiarly apposite here, as it appears that the evidence of the defendant to meet a new phase arising in the trial of the action was in Baltimore and not accessible for the purposes of the trial.

The materiality of this evidence is further demonstrated by the charge, in which the liability of the defendant is made to depend altogether on the conduct of the gateman at Baltimore, as follows:

"If they went to the station and remained there, waiting for a train they knew to be too late, when they had opportunity to take other trains which would put them there in time, they could not recover.

"If the jury believes the evidence in this case, there were several trains leaving Baltimore for Washington after the plaintiff had reached the station, either one of which they could have taken and reached Washington before 9:30; and if they had opportunity to take this train or any one of them, and failed to do so, with the opportunity to do it, then their failure to take one of those trains would be negligence on their part and not on the part of the railroad company, the burden being on the plaintiffs to satisfy the jury by the greater weight of the evidence that they were detained there by the negligence of the railroad company."

We are also influenced in our decision and inclined to give effect to the principle requiring allegation as well as proof, because the two actions

were treated as identical, the same charge being given on all the issues, without discrimination as to the law or the contentions of the parties, when there was a radical difference, as disclosed by the evidence of the plaintiffs.

The plaintiff Nita Williams testified:

1. "I took the first train for Washington after I got to the station."

2. "We paid for a Pullman section and got one in Washington. We did not ask the porter to make that down for us. I was sick. We did not ask anybody to make it down for us, and nobody disturbed us in it."

3. "Had a night's rest from Richmond. I don't think I moved."

The plaintiff Jennie Sultan testified:

1. "I know there were a number of trains going to Washington. I went to the man two or three times with that knowledge. I knew this ticket was good to Washington. We could have gone to Washington on any one of those trains if we could have gotten through the gate."

2. "I asked him to make our berths down to Richmond, and he said 'No.'"

3. "I don't think I had fifteen minutes sleep the whole night."

These contradictions were material on the issues of negligence and damages, and required the application of different principles in separate charges.

For the reasons stated, a new trial is ordered.

New trial.

CAPE LOOKOUT LAND COMPANY, PROTESTANT, v. C. S. MAXWELL, ENTERER.

(Filed 2 October, 1918.)

1. State's Land—Entry—Protest—Issues—Form.

State's land is not vacant and subject to entry if it has been already granted by the State, and a protestant claiming under the prior grant need not necessarily connect his title therewith in order to defeat the junior entry; and the form of an issue is objectionable which submits the question as to whether the protestant was seized and possessed of the *locus in quo*.

2. Appeal and Error—Issues—Answers—Record—Interpretation—Harmless Error.

The objectionable form of an issue, answered by the jury, need not necessarily result in a new trial; and when it appears by reading the verdict, in the light of the whole record, that no prejudicial error has been committed, the verdict thereon will not be disturbed on appeal.

3. Same — State's Lands — Entry — Protest—Grants—Title—Instructions—Trials.

When it appears that the issue submitted is directed to the seizin and possession of the protestant claiming under a prior entry to State's lands, but that the charge of the court put the burden upon the enterer to show, by the greater weight of the evidence, that the prior grant, at the time it was originally issued, did not cover the *locus in quo* and made his right to recover depend thereon: *Held*, the case having been tried upon the correct principle, the objectionable form of the issue would not alone warrant an order for a new trial. *Walker v. Parker*, 169 N. C., 155, cited, approved, and applied.

4. Appeal and Error — Evidence — Objections and Exceptions — Harmless Error.

The exclusion of evidence of a grant of State's lands to the United States Government, offered by the protestant for the purpose of showing sufficient adverse possession to confer title, is immaterial, upon the trial of a protest to an entry of State's lands, when there is nothing to show that this part of the land interfered with the entry protested.

5. Appeal and Error — Evidence — Maps—State's Lands—Entry—Protest—Harmless Error.

When the map has been introduced in evidence upon a trial protesting an entry of State's land, testimony of a witness, upon information, as to a beginning corner, is immaterial, if objectionable, when from the map this corner is self-evident, and the evidence could not have had any appreciable effect on the trial.

APPEAL by protestant from *Calvert, J.*, at June Term, 1918, of CARTERET.

This is a protest to an entry, the protestant claiming that the land entered is not vacant and unappropriated land, because—

1. It is covered by a grant issued by the State to John Fulford.

2. If the land entered is not covered by the grant, the title to it is in the protestant by the law of accretion.

3. If the land is not covered by the grant, the title to it is in the protestant by adverse possession.

The exceptions relate to evidence and to parts of the charge, which will be adverted to in the opinion.

The jury returned the following verdict:

1. Is the protestant, Cape Lookout Land Company, seized and possessed of the Cape Lookout lands, round the present location of Cape Lookout Point, as marked on the map, up to and including the parts marked as Divine Cove and Wreck Point? Answer: No.

2. Is the land described in the entry and survey of Maxwell's entry vacant and unappropriated? Answer: Yes.

The protestant excepted to the issues submitted to the jury, and tendered other issues.

There was a judgment in favor of the enterer, and the protestant appealed.

Julius F. Duncan for protestant.
Graham W. Duncan and R. E. Whitehurst for enterer.

ALLEN, J. We do not approve the form of the issue submitted to the jury because, under the first issue, the fact in dispute is whether the land company is seized of the land in controversy, when in a proceeding like this to protest an entry the enterer must fail unless he shows that the grant relied on by the protestant does not cover his entry; and if it appears that the entry is within the grant, the land is not vacant and unappropriated and subject to entry, although the protestant does not connect himself with the grant. In other words, the issue, separated from the charge, would lead to the conclusion that the grant could not be used to defeat the entry unless the protestant connected himself with it, when on the contrary the land is not vacant and subject to entry if it has been already granted by the State without regard to who has acquired title under the grant. This would be sufficient to justify ordering a new trial if we were not required to look at the whole record and to read the verdict with reference to the trial (*Taylor v. Stewart,* 175 N. C., 200); and when we do so we find no reversible error.

His Honor charged the jury that the first question presented under the issue was whether the Fulford grant covered the entry, and that "the burden is upon Maxwell, the enterer, to satisfy you from the evidence and by its greater weight that the Fulford grant at the time it was originally issued did not cover the whole of that land around point 2 and up to and including Divine Cove." He then explained fully and accurately the law of accretion and adverse possession and placed the burden of proof on the protestant of establishing title in these ways, and concluded by instructing the jury that if the entry was within the grant, or if the protestant had acquired title by accretion or adverse possession, to answer the issue "Yes."

These instructions are in accord with the rules established for the trial of a protest to an entry which are summarized in *Walker v. Parker,* 169 N. C., 155, as follows:

"1. The protestant shall be required to state in his protest that he claims an interest in or title to the land covered by the entry, and if he fails to do so his protest shall be dismissed.

"2. If he claims that a grant has been issued for the land covered by the entry he shall name the grant and describe it with as much particularity as he can.

"3. When the protestant alleges that the State has issued a grant

covering the entry, the burden is on the enterer to prove to the satisfaction of the jury that the grant does not cover the land described in the entry, and if he fails to do so no grant can issue upon his entry.

"4. If the enterer establishes the fact that the grant described in the protest does not cover the land described in the entry, the protestant may, if he has so alleged in his protest, and not otherwise, prove that the land in the entry is not vacant and unappropriated land by reason of adverse possession, and that the burden of so proving is upon him.

"5. If the protestant does not allege in his protest that a grant has issued for the land, but that the land is vacant and unappropriated by reason of an adverse possession, the burden of proof upon this allegation is upon the protestant."

This disposes of the principle grounds of complaint by the protestant, which are that his Honor did not place the burden of proof on the enterer to show that the grant did not cover the entry, and that he applied the rules governing the trial of actions to recover land to the present proceeding.

There are two exceptions to evidence which, as we understand the record, are without merit. The first is as to the exclusion of evidence offered by the protestant to prove that a part of the land in the Fulford grant had been sold to the United States Government, and that it had been held adversely long enough to confer title, but there is nothing to show that this part of the land interfered with the entry, and the evidence was therefore immaterial. The second is to alleging a witness to state that if the beginning corner of the grant and information that had been given to him was correct, that Lookout Point was at 3 on the map, which on the conditions assumed was self-evident, and in any event the evidence could not have had any appreciable effect on the trial.

We have carefully examined the record and find no reason for disturbing the verdict.

No error.

ELSIE B. PARKER AND HER GUARDIAN, P. H. PARKER, v. E. H. HORTON AND EULA A. HORTON.

(Filed 2 October, 1918.)

1. Bills and Notes—Interest—Maturity—Actions.

Interest due and payable under the terms of a written instrument may be recovered in an action before the principal sum has become due.

2. Justices of the Peace—Courts—Jurisdiction—Bills and Notes—Land.

Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his jurisdiction

is not ousted by reason of the note having been executed for the purchase of land.

3. Justices of the Peace—Pleadings, Written—Admissions.

Where the parties to an action before a justice of the peace have elected to file written pleadings, the pleadings are subject to the rule that material allegation in the complaint not denied by the answer stand admitted. Revisal, sec. 1458.

4. Judgments—Pleadings—Admissions—Bills and Notes—Failure of Consideration—Infants—Deeds and Conveyances—Warranty.

Where defendant alleges in his answer that a negotiable note sued on was given in the purchase of lands from the plaintiff and another, and a failure of consideration for want of title, but fails to deny the plaintiff's allegation that he is a holder of the instrument in due course, before maturity: *Held*, the question raised as to the consideration for the note prevents the rendition of a judgment against the defendant upon admission in the pleadings, which is not affected by the fact that the plaintiff was under twenty-one years of age when conveying the land, and may not be liable upon his warranty.

5. Judgments—Pleadings—Admissions—Allegations in Answer—Evidence.

In rendering judgment upon the pleadings, the matters alleged as a defense must be regarded and dealt with as if established by the evidence.

APPEAL by both parties from *Carter, J.*, at the July Term, 1918, of HERTFORD.

This is an action against E. H. Horton and Eula A. Horton to recover interest on a note before the principal became due, commenced before a justice of the peace and heard in the Superior Court on the appeal of the defendants.

The return of the justice shows that the plaintiff complained for an amount of interest due on a note and filed a written complaint, and that the defendants denied the right of the plaintiff to recover, and filed a written answer.

The written complaint of plaintiff alleged that on 24 July, 1912, the defendants executed their negotiable promissory note payable to Walter G. Connor, by which they promised to pay to his order on 1 July, 1919, the sum of $550, with interest from 1 January, 1913, payable annually; that on the 8th day of March, 1913, the said Walter G. Connor, for value and in due course, indorsed and transferred said note to Elsie B. Connor, who afterwards intermarried with P. H. Parker and is a plaintiff in this action, and that no part of the interest due on said note has been paid.

The answer of the defendant did not deny these allegations of the complaint, but it alleged that the note declared on by the plaintiff was given for the purchase money of the tract of land which the *plaintiff* and Walter G. Connor sold and conveyed to the defendants; that the

plaintiff and the said Connor warranted the title to said land, and that they had no title thereto, and that the defendants got nothing by the conveyance of said land.

While the action was pending in the Superior Court, Mrs. Eula A. Horton died and her administrator was made a party defendant by service of a summons returnable to the Superior Court on the first Monday in March, 1918, and commanding the administrator to answer the complaint which would be deposited in the office of the clerk within the first three days of said term.

No pleadings were filed after the administrator was made a party, nor was there any amendment to the original complaint.

In the Superior Court the plaintiff moved for judgment against both defendants upon the ground that there was no denial of the cause of action alleged in the complaint, and as the plaintiff was a holder of the note in due course, that the matters alleged in the answer were not available against her as a defense or setoff.

The motion was allowed as to the male defendant and denied as to the administrator because there was no pleading as to him, and to the refusal to enter judgment against the administrator the plaintiff excepted.

The defendants moved the court to be allowed to amend their answer or to file a new answer. This was denied and the defendants excepted.

The male defendant also excepted to the rendition of judgment against him on the ground that he had denied liability according to the return made by the justice of the peace. Both defendants also contended that the justice of the peace had no jurisdiction of the cause of action. The defendants also offered to introduce evidence which the court would not allow them to do.

Judgment was rendered on the pleadings in favor of the plaintiff against the male defendant, and both parties appealed.

E. R. Tyler and Winborne & Winborne for plaintiff.
Alexander Lassiter and Gillam & Davenport for defendants.

ALLEN, J. This action to recover interest before the principal became due can be maintained because by the terms of the note the interest is payable annually (*Bledsoe v. Nixon*, 69 N. C., 91; *Scott v. Fisher*, 110 N. C., 311), and the jurisdiction of the justice's court is not defeated by reason of the note being executed for the purchase of land. *McPeters v. English*, 141 N. C., 491.

We have then an action properly constituted, of which the court had jurisdiction, and as it was pending before a justice of the peace the parties could, at their election, plead orally or in writing. "If oral,

the substance must be entered by the justice on his docket; if written, they must be filed by the justice and a reference to them be made on his docket." Revisal, sec. 1458.

They have elected to file written pleadings, and are subject to the rule that material allegations in the complaint not denied by the answer "stand admitted" (31 Cyc., 207), and as the allegations not denied show the plaintiff to be a purchaser for value of the note, a negotiable instrument, before maturity, and the amount of interest due, the plaintiff was entitled to judgment against the male defendant as upon admissions of the parties unless the matters alleged as a defense are available against the plaintiff. (*Bank v. Hatcher,* 151 N. C., 359.) And upon this question we would have no difficulty in approving the ruling of the Superior Court but for the allegation in the answer that the plaintiff and W. G. Connor sold the land to the defendants; that the note set out in the complaint was given for the purchase money, and that there was a total failure of title.

If these allegations are true, while the plaintiff, who is under twenty-one years of age, may not be liable upon a warranty, there is an entire failure of consideration, of which the plaintiff had knowledge as she participated in the sale, and she could not recover; and when judgment has been rendered upon the pleadings, we must deal with matters alleged in defense as if established by evidence. It follows that there is error in allowing the motion for judgment, and this makes it unnecessary to consider the other exceptions of the plaintiff and the defendants.

Reversed.

DAVID J. WILLIAMS v. D. F. BLIZZARD.

(Filed 9 October, 1918.)

Estates—Gifts—Remainders—Contingent Limitations—Tenants in Common—Rule in Shelley's Case—Deeds and Conveyances—Defeasible Fee.

A gift of land to donor's named "grandson (a young child at the time) and his lawful heirs, children, if any; if not, to his brothers and sisters, respectively," conveys to the grandson a fee-simple title, defeasible upon his dying without children, in which event it would go to his brothers and sisters, the improbability thereof in a certain instance not being considered; and by the use of the word "respectively," as placed, neither the grandson and his children nor the grandson and his brothers and sisters take as tenants in common, but distinctively as a class, depending upon the happening or non-happening of the contingency of his dying without children. The Rule in Shelley's Case has no application.

WILLIAMS *v.* BLIZZARD.

APPEAL by defendant from *Stacy, J.*, at chambers, in Clinton, 1 May, 1918.

Controversy submitted without action under Revisal, 803. The plaintiff contracted to deliver to the defendant a good and sufficient deed in fee simple, with the usual covenants, to the tract of land therein described. The defendant refused to accept said deed upon the ground that the plaintiff could not convey a fee-simple deed to said tract. The court adjudged in favor of the plaintiff, and the defendant appealed.

H. D. Williams for plaintiff.
George R. Ward for defendant.

CLARK, C. J. The question presented depends upon the construction of the following words in a deed executed by James Williams 24 May, 1847, to the plaintiff, his grandson, who was then four months of age, which conveyed to his "grandson, David Williams, and his lawful heirs, children, if any; if not, to his brothers and sisters, respectively, a certain tract of land in the county of Duplin and State aforesaid" (describing the same), with habendum, "to him, the said David Williams, and his lawful heirs, children, if any; if not, to his brothers and sisters as aforesaid, to his and their own proper use and behoof in fee simple forever," etc., with warranty clause, again repeating the same words of limitation.

The deed is inartificially drawn. The words, "David Williams, and his lawful heirs, children, if any; if not, to his brothers and sisters, respectively," are thrice repeated, *i. e.*, in the conveying clause, in the habendum, and in the warranty. We understand therefrom that the grantor had a well-defined and clear intention to convey this property to his grandson and his lawful heirs, if he left children. In such contingency a deed by him to the defendant would convey a fee simple under the Rule in Shelley's Case. But if there should be a defeasance by his leaving no children as his heirs (improbable as such contingency is on the facts in this case), then the property is to go to his brothers and sisters. It was to prevent his disposing of the property by devise or deed to others in such case that the defeasance was put into the deed. Otherwise, this thrice repeated limitation in the deed is entirely meaningless. The evident intent was to hedge the conveyance with a restriction by which the property should go to the grantee's brothers and sisters notwithstanding any deed or devise by him should he leave no children as his heirs.

The words used are contradictory of the purpose to convey the property to David Williams and his heirs generally. The use of words "children, if any; if not, to his brothers and sisters, respectively" bring

the case, we think, under the rule laid down in *Whitfield v. Garris,* 134 N. C., 24, which held, "where a testator devises realty to a grandson, and in the event of the death of the grandson without children, then the realty to descend to other grandchildren, such devise vests a fee-simple estate in the devisee, defeasible only on condition that he dies without leaving heirs of his body." The language used, "children, if any; if not" in the connection used is equivalent to saying "unto David Williams and his lawful heirs; but if he should die without children, then to his brothers and sisters." This brings the deed clearly within the line of cases which hold that the estate in the grantee is a defeasible fee simple. *Smith v. Lumber Co.,* 155 N. C., 389; *O'Neal v. Borders,* 170 N. C., 483.

The provisions in this deed are a conditional limitation. *Smith v. Brisson,* 90 N. C., 284. In the "case agreed" it is admitted that at the time of the deed, David J. Williams, then an infant four months old, had several brothers and sisters then living, two of whom still survive. He is now a man of about 72 years of age and the father of twelve living children. The object of this proceeding is evidently to test the question whether he can either devise the land or convey it in fee simple should he leave no children. It was to prevent this very thing that the provision was put in the deed that in such contingency the property shall go to the brothers and sisters of the grantee. The purpose was to keep the property in the family.

This was not an estate in the plaintiff and his children which would have made them tenants in common, as in *Heath v. Heath,* 114 N. C., 547, for the reason that the plaintiff at the date of the deed had no living children. Nor was it an estate in common between the plaintiff and his brothers and sisters, for the word "respectively" follows this clause and indicates that they were taken as a class and only in default of children.

It appears in the agreement that the defendant admits that the plaintiff has twelve living children, and that one or more of them will survive the plaintiff, but this, however, is an admission of a future event which the Court cannot act upon. While it is extremely improbable as a matter of fact that David Williams shall leave no children as his heirs, it is not an impossibility as a matter of law. The defendant evidently will run no appreciable risk, but, as we construe the instrument, David Williams cannot convey a fee simple, indefeasible, but it will be defeasible only upon the contingency of his leaving no children as his heirs, for in that event the property would go to his brothers and sisters by the express terms thrice repeated in the conveyance to him.

Reversed.

THE MURRAY COMPANY v. BROADWAY AND LANGSTON.

(Filed 9 October, 1918.)

1. Vendor and Purchaser—Contracts, Written—Parol Evidence—Warranty —Defense—Counter-claim.

Where a written contract of sale of a cotton ginning outfit contains the stipulation that the purchaser should provide sufficient motive power for its operation, if the same were not furnished by the seller, and the purchaser has undertaken to provide the same, with further stipulation that the writing is exact and entire, and no agreement or understanding, verbal or otherwise, will be recognized unless therein contained: *Held*, parol agreements as to the daily capacity of the gin operated by a certain engine the purchaser had used under the salesman's representation as to its sufficiency for the purpose, is contradictory of and excluded by the terms of the writing; and in the absence of sufficient allegation or evidence to cancel the writing or of fraud and deceit, the parol agreement is not available to the purchaser either by way of defense or counterclaim for damages sustained.

2. Contracts—Fraud—Evidence—Parol Evidence.

The rule permitting parol evidence to contradict the terms of a written instrument attacked for fraud in its procurement has no application when there is no allegation or sufficient evidence of such fraud, and the effect of parol evidence is only to vary the terms of the agreement as expressed in the writing. *Bullock v. Machine Co.*, 161 N. C., 13; *Machine Co. v. Feezer*, 152 N. C., 516, cited and applied.

ACTION tried before *Calvert, J.*, and a jury, at February Term, 1918, of LENOIR.

The action was to recover the balance due on the last note given on purchase price of a ginning outfit sold by plaintiff to defendant. Defendant denied liability and set up a counter-claim in excess of any balance due. On issues submitted, there was verdict for plaintiff for $183.95, the balance due on the purchase price.

Judgment for plaintiff, and defendant excepted and appealed.

J. F. Liles for plaintiff.
Rouse & Rouse for defendant.

HOKE, J. The evidence on the part of plaintiff tended to show that in April, 1914, he sold and delivered to defendant a ginning outfit consisting of two gins, elevator, press and necessary equipment for the sum of $1,483.72, $516.92 being paid in cash, and the balance due and payable, respectively, on 15 November, 1914, and 15 November, 1915; that the first note has been paid off and discharged and payments made on the second, leaving a balance due thereon of $183.95; that soon after the sale had, the machinery was delivered and installed, and later defendants gave to plaintiff a certificate in terms as follows:

"The Murray Company, Atlanta, Ga. Gentlemen: This is to certify that the machinery sold the undersigned on contract 538 has been erected in good workmanlike manner in our plant. The same is complete, is in good order and in accordance with the terms of the contract, and is hereby accepted. We have settled in full with your Mr. Frazier the sum of $80 for the erection of the machinery" (making it more compact); that the contract between the parties was in writing, and same contained, among other stipulations, the following:

(*a*) "If the engine or boiler is not furnished by the Murray Company, then we agree to provide motive power of sufficient capacity to drive machinery specified herein (the Murray Company to be held in no manner responsible if insufficient), and arrange to run the line of shaft the speed required by the Murray plans"; and at the close of the contract:

"It is hereby expressly agreed that the above and foregoing is the exact and entire contract between the purchaser and the Murray Company, and that no agreement or understanding, verbal or otherwise, will be recognized unless specified in this contract, which includes the warranty as above stated."

Defendants, admitting the purchase, delivery and use of the machinery, and that there was a balance due on the face of the notes, alleged by way of counter-claim and offered evidence tending to show that at the time of the purchase and as an inducement thereto and as a part of the consideration of the same, plaintiff's agent in charge of the sale had reported to defendants that a certain 35-horsepower kerosene engine made by the International Harvester Company and sold by one H. H. Grainger would properly and sufficiently operate said ginning plant and outfit, and orally contracted and agreed that said outfit when operated by said engine would have the capacity to gin, and would gin, daily twenty-five to thirty bales of lint cotton, and that the power furnished would be ample for the purpose; that in reliance upon said representation and contract, said engine was procured and the gins, etc., operated therewith, but that the same had never been sufficient to operate said gins and they had never been able to produce more than ten or twelve bales per day.

Owing to the long delay and protracted use of the machinery without protest on the part of defendants, it is no longer open to them to set aside this trade on the ground of fraud, and they do not seek to do so, and while there are accompanying this counter-claim, general averments that the defendants were entirely ignorant of the nature and value of machinery and relied on the statements and representations of plaintiff's agent, etc., inducing the trade there is neither allegation nor evidence on the part of defendants to justify a recovery of damages for

fraud and deceit, a course sometimes open to a purchaser when such fraud and deceit is sufficiently alleged and established (*May v. Loomis,* 140 N. C., 350; *Van Natta v. Snyder,* 98 Kan., 102), and in their principal answer defendants have only set up a counter-claim for breach of warranty in that the engine would not properly operate the machinery nor give the amount of twenty-five or thirty bales per day.

Confronted in the written contract with an express stipulation that plaintiffs (if engine was purchased from others) would not be responsible if same was insufficient, defendants, on leave, had amended their answer and alleged that this stipulation was inserted in the contract by mutual mistake of the parties or by mistake of the defendants and the fraud of plaintiffs.

On the issue raised by this averment, we find no evidence whatever to support the position that there was any mistake on the part of plaintiffs in this feature of the contract, and we are inclined to concur in his Honor's view that the evidence offered is entirely insufficient to show any fraud in this respect on the part of plaintiff; but if it be conceded that there was such evidence and sufficient to carry the question to the jury on a proper issue, there is no allegation of either mistake or fraud in regard to the remaining stipulation at the close of the written contract between the parties, "That no agreement or understanding, verbal or otherwise, will be recognized unless specified in this contract, which includes the warranty above stated." Nor is there allegation, evidence, or claim, that the stipulation relied upon as the basis of defendant's counter-claim appears anywhere in the written contract.

Defendant's case, then, is merely a counter-claim for breach of an oral agreement in direct contravention of the written contract, and in our opinion comes clearly within the principles of *Machine Co. v. McClamock,* 152 N. C., 405, and other cases in accord with that well considered decision, that where a written agreement of this character stands as the contract between the parties it excludes from consideration any and all breaches of parol agreements either by way of defense or counter-claim. *Harvester Co. v. Carter,* 173 N. C., 229, 231; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Simpson v. Greene & Sons,* 160 N. C., 31.

The position in no way antagonizes the decisions in *Bullock v. Machine Co.,* 161 N. C., 13, and *Machine Co. v. Feezer,* 152 N. C., 516, and others of like purport. In these cases the written contracts were set aside for fraud, definitely alleged, clearly established, and promptly asserted, and it was held that the stipulations contained therein restrictive of the agent's power to bind or in any way affect the principal failed with the contract of which they were a part.

In *Bullocks' case, supra,* it was held as follows: "The principle that a written contract may not be contradicted or varied by parol evidence

has no application when the writing itself is attacked for fraud; for if the contract is vitiated by fraud, its provisions are carried with it, and a clause in a contract of sale that it may not be varied by the representations of the sales agent cannot have any effect if the contract itself fails."

A like ruling was made in *Machine Co. v. Feezer, supra,* and speaking to the question in the opinion the Court said: "In the case at bar, as soon as the purchaser discovered the defects complained of, and was aware of the facts relevant to the issue, he immediately restored the property to the company's agent 'in as good a condition as when he got it,' and having done this and pleaded and established the fraud in annulment of the trade, the restrictive stipulations are, as stated, no longer available. To hold the contrary would be to sanction the principle that the deeper the guilt the greater the immunity, and enable fraud by its own contrivances to so entrench itself that its position would in many instances be practically unassailable."

In the instant case, however, as stated, the contract stands and the rights and liabilities of the parties must be governed by its terms and provisions.

There is no error and the judgment of the Superior Court is affirmed.

No error.

MINNIE MILLER v. BANK OF WASHINGTON.

(Filed 9 October, 1918.)

Appeal and Error—Divided Court—Judgments—Bank and Banking—Deposits—Claimant—Notice—Issues—Answers—Opinions.

The matters for decision on this appeal are whether the defendant bank is responsible to the true owner for paying the depositor, under the facts of this case, after notice given to it by owner that the money was her own, and not that of the depositor; and whether the findings to the issues submitted were irreconcilable and a new trial should be ordered. The Court being equally divided, BROWN, J., not sitting; CLARK, C. J., writing an opinion; HOKE, J., concurring; WALKER and ALLEN, JJ., each writing a dissenting opinion. The judgment of the lower court is affirmed without being a precedent.

APPEAL by defendant from *Bond, J.,* at February Term, 1918, of BEAUFORT.

This is an appeal by the defendant bank from a judgment requiring it to pay the plaintiff Minnie Miller $800 and interest. The complaint alleged that her husband, G. H. Miller, had fraudulently procured said $800 from her, and with the fraudulent purpose to convert it to his own

use and unknown to her, had deposited it in the defendant bank in Washington, N. C., in his own name, but notwithstanding the notice to the bank from her of such facts and of the attendant circumstances, and her notice not to pay out the same to him, and though knowing that she was getting out an attachment upon said sum, the bank paid out the said money to G. H. Miller, who immediately absconded and left the State. The plaintiff says she handed him the money to put in the bank at Belhaven, where she lived.

The jury found upon the issues submitted that when the bank paid said fund over to G. H. Miller, the plaintiff Minnie Miller was the equitable owner of said deposit; that the bank knew that she claimed to own said fund, and knew, or had reason to believe, that she was getting out proceedings to have the same attached.

There was evidence that the said G. H. Miller was the second husband of the plaintiff, who had four children by her first husband, and that she mortgaged her home to procure this $800 to go into business with Miller, and gave it to him to deposit in the bank at Belhaven, where they lived, but without her authority he put it in the bank at Washington in his own name, and threatened to leave the State; that suspecting his purpose, she consulted a lawyer in Belhaven, who put her in phone communication with his partner, Mr. McMullen, a prominent lawyer in Washington, whom she notified that she would arrive on the next train. He took her in his car to the bank and saw the cashier, whom, as she testified, she told "all about" the circumstances, and that her husband was drinking and intended to defraud her of said sum. The cashier, while declining to admit that the money had been deposited by the husband, intimated to the plaintiff's lawyer, Mr. McMullen, who was also a director in the bank, that he could take out legal proceedings to stop payment. Mr. McMullen, after advising the cashier not to pay the money to plaintiff's husband, returned to his office with the plaintiff to get out proceedings in attachment. The defendant's cashier, knowing of this purpose, in a very short time, called up Mr. McMullen and told him he need not proceed any further, that he had paid out the $800 to Mr. G. H. Miller. The latter, having discovered his wife's purpose, had come through the country in an automobile, and, presenting himself to the cashier, after the plaintiff's notice to him that it was her property deposited with her husband for a certain specified purpose, and that he was intending fraudulently to convert it to his own uses, the cashier paid out the full amount thereof to him while attachment proceedings were being prepared. Miller immediately left the State and his whereabouts are unknown.

Ward & Grimes for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

CLARK, C. J. When a bank has reasonable notice of a *bona fide* claim that money deposited with it is the property of another than the depositor, it should withhold payment until there is reasonable opportunity to institute legal proceedings to contest the ownership. For a much stronger reason, a bank should withhold payment when it has notice, as in this case, not merely that the title to the fund is in question, but that it has been deposited without the authority of the owner, with the fraudulent intent on the part of a trustee or agent to convert to his own use funds placed with him in trust.

Suppose the bank was notified that funds placed on deposit had been stolen by the depositor? The bank surely under such circumstances could not be justified in paying over said fund to the depositor. This is so, also, as a matter of public policy in cases where an agent or official deposits with a bank funds which it has notice that he has embezzled. The bank could not in such cases pay over such sum to the depositor without being a "fence."

In this case if there was not embezzlement, the evidence is uncontradicted that the bank had notice that the plaintiff claimed that said G. H. Miller had by false pretenses procured his wife to mortgage her home to procure said $800, and had induced her to place the same in his hands for a specified purpose with the intent in breach of his trust to convert same to his own use. The defendant, with notice of these allegations made to it by the plaintiff, and with knowledge that said lawyer was preparing attachment proceedings, in a few minutes thereafter nevertheless paid out said fund to the husband, who immediately absconded. In the verdict and judgment holding the defendant liable for such payment there was no error. *Stair v. Bank,* 53 Pa. St., 364; 93 Amer. Decis., 759; *Bank v. Mason,* 95 Penn. St., 117; *McDermott v. Bank,* 100 *ib.,* 287. *Bank v. Mason* holds that the deposit is but *prima facie* evidence of the ownership of the fund by the depositor. *McDermott v. Bank* holds that money deposited in a bank to the credit of one person can be shown to be the property of another. It is also held in *Bank v. King,* 57 Penn. St., 206, that the deposit of money belonging to a trust fund by a trustee in his own name does not change the title thereto.

In such cases, when notice is given to a bank, it will pay the depositor at its own risk. *Bank v. Bache,* 71 Penn. St. (21 P. F. Smith), 213, citing *Bank v. King,* 7 B. P. Smith, 202. To the same purport *Bank v. Gillespie,* 137 U. S., 411, and annotations thereto in Rose's Notes.

In Tiffany on Banks, p. 50, it is said, "After receiving notice of an adverse claim, the bank will pay its depositor at its peril. . . . Payment to the equitable owner will, of course, always be a defense," citing *Brown v. Bank,* 51 Kan., 359; *Commission Co. v. Gerlack,* 92 Mo. App., 326; *Adams v. Shoe and Leather Co.,* 9 N. Y. Supp., 75.

In Morse on Banks (3 ed.), sec. 342, it is said: "A bank is justified in paying to the depositor, or his order, until the fund is claimed by some other person. But if notified that the funds belong to another, it will pay the depositor at its peril. If it has notice that a third person claims under a superior title and intends to enforce a claim adverse to the depository, the bank should hold the funds until the title is settled, or take a bond of indemnity; otherwise it may be a loser," citing several cases.

In our own State, *Bank v. Clapp*, 76 N. C., 482, holds that where the bank participates with the trustee in the misapplication of a fund, it is liable to the *cestui que trust* for any loss sustained thereby. In this case, while the bank did not actively participate in the sense of receiving any benefit therefrom, it was liable for its negligence, to say the least, in not holding the fund under all the circumstances till the plaintiff could take out legal proceedings and prove her allegations of being the beneficial owner of the fund, as she has since done in this action. The whole evidence shows the evident good faith of the plaintiff. Besides, the jury find that she was the direct owner of the deposit.

There is no evidence impeaching her character. On the contrary, two witnesses testified to her good character, and none to the contrary.

There is no defect in that the absconding husband is not a party to this proceeding. He has no possible interest in this action, for he has received the fund, and the judgment herein cannot affect him in any way. It would have been otherwise if the fund had not been paid over, but was still in litigation, and in that event the bank might have made him a party by publication. As it is, "The subsequent proceedings interest him no more."

It is true that the jury also found that the plaintiff did not notify the bank "that the $800 was her money and *why* it was in the bank and request the bank to hold it until she could have it attached," but in view of the fact that the jury found that the plaintiff was the equitable owner of the $800 when it paid Miller the money, and that it knew at the time that it paid him that the plaintiff claimed to own the money, and that it knew, or had reason to believe, that the plaintiff was proceeding to have the same attached, judgment was properly entered for the plaintiff. It was not essential that she should have notified the bank that it was her money, and why, and request the bank to hold it until she could have it attached when it is found that she was the real owner; that the bank knew she claimed to own the fund and knew, or had reason to believe, that she was proceeding to have it attached.

The statement of ten of the jurors after they were discharged that they intended to find a verdict for the defendant bank was a legal inference and was disregarded by the court. It was a matter which rested

within its discretion. If verdicts must be set aside as a matter of law upon such representations of a jury after its discharge, it will encourage proceedings that will be altogether unseemly in the practice of the courts and in the due administration of justice. The action of the judge in such cases must necessarily be left to the discretion of the presiding judge, who has full knowledge of the attendant circumstances, and possibly of much which does not appear in the record.

Upon the findings of the jury the judge properly entered judgment for the plaintiff.

The geologist upon the examination of a lump of coal can discover the species of trees of which it was composed eons ago. The layer of sandstone or of marble will show the raindrops and the footprints of passing animals when these substances were yet plastic with heat. Amber and other substances retain the insects that lighted upon them. From these substances the scientists can rebuild the story of thousands of years ago when man or semi-man, or beast, was floundering in the bogs and swamps where now stand the solid hills or spread out are the smiling plains. So in the dry records of legal proceedings are embalmed many a tale of wrong and of woe which can be deciphered by some future historian, but in few of them can be found a more pathetic or moving kinema of life than is shown in this case.

In this instance four helpless little children were left to the care of their widowed mother, who seemed to them a deity on earth — and to them such she was, for she alone stood between them and the cold and want and hunger of a heartless world. Their father despairing in the struggle of life, or perhaps with a diseased brain, and despondent, unsummoned and uncalled, struck by a suicide's hand staggered out of life into the great silence. In some sane and unselfish moment he had insured his life. With this the mother of these children bought an humble home. Then came the prowling wolf in human shape.

With the plea that by the union of his labor and her little capital conditions could be bettered, he proposed marriage and a union of his labor and of her money, the latter to be raised by an $800 mortgage on the little home. The appeal to mother love, the most divine spark that this world holds, was irresistible. The marriage made, the $800 raised on the mortgage was given to the deceiver by the mother, to be placed in the bank where they lived. The enterprise had not yet been begun. The money was still the mother's (as the jury found). The agent, false to his trust, and without the plaintiff's authority or knowledge, placed the fund in his own name in the defendant bank, in a town 30 miles away. Learning of this, and that the trustee intended to fly the State, the frightened mother, unknowing at first what to do, was at last advised by counsel, and, hastening to Washington, N. C., by rail, in company with

a director of the defendant bank, told the cashier (as the jury find) that she claimed the fund, and the jury find also that she owned it and that the bank knew she would at once take out legal proceedings to attach it. In the meantime the false depositor, having been informed by wire or otherwise by some one, rushing through the country by automobile and getting to the bank, the defendant promptly paid the plaintiff's $800 over to him, and he disappeared "over the rim of the world," and his whereabouts are unknown to this day, according to the evidence. The defendant knew that the plaintiff's counsel was preparing papers to protect her rights as owner of the fund (as the jury find she was), for he phoned her counsel that he need not proceed, for he had paid out the fund to the defaulting and fugitive depositor. "Then all the Greeks took Sosthenes, the chief ruler of the synagogue, and beat him before the judgment seat, and Gallio (the governor and judge) cared for none of these things." Acts xviii, 16. The defendant cared not that the true owner should lose the fund, and that the defaulter should make off with it before the plaintiff, by legal proceedings, could protect the rights of herself and of her helpless children in the protecting fund left by their father.

The swindling defaulter has disappeared, no man knows where, and the plaintiff's money, the hope of her four little children, disappeared with him. The mortgage, however, remains and sticks closer than a brother, and with it and the court costs will go the roof from over their heads, unless speedy justice is rendered. Inspiration tells us that above the roof of that humble home is God and His Heaven, and poetry tells us that the stars are always shining there, but remove that shelter, and the snows and sleets and the winds of winter will come till the deceived and despairing mother, like the widow of Blennerhassett, perchance, "may be found alone at midnight, mingling her tears with the torrents that freeze as they fall."

It was easy for the defendant to regard only its own interests, and, careless of the rights of the plaintiff turn over the fund to the deceiver and the defaulter, while the plaintiff, as it knew, was endeavoring to complete the legal proceedings to enable her to assert her rights. The Court might lightly order a new trial, but the mortgagee will need his principal and interest when they are not forthcoming. There must be money for the lawyer and the witnesses, and there shall be the delays of justice "which maketh the heart sick," while the little children may lack shelter and cry for bread.

The plaintiff's $800 (for the jury find it was hers) was wrongfully paid out by the defendant in July, 1915, three years and two months ago, and the plaintiff has already lost more than $150, interest on money which she has not, besides the lawyer's fees and the loss of time attending

court, and other expenses, to recover her own. Is not this enough? Justice is "lame in its feet," like Mephibosheth, the son of Jonathan (2 Sam. iv, 4), and moves slowly. The Scriptures are full of injunctions to give judgment in righteousness for the protection of the "widow and the fatherless."

Have those fatherless little children no rights, which the courts can consider, in the shelter provided by the foresight of their unfortunate father—children of whom God, when He walked the earth, said that of such in heart were His kingdom?

The court and jury have said that the frantic and deceived mother was the true owner of that home, which she devotes to her children. Why protract litigation till interest and costs of litigation shall take it from them? The story of the fair-haired wife of Sparta's king,

> "Whose face launched a thousand ships
> And sacked the topmost towers of Troy."

as told by the blind old bard, still moves the hearts of men, after the lapse of thirty centuries, in proof of the might and majesty and power of the beauty that is woman; but there is greater power, because more universal and more pathetic, in that mother love which dares do, and does, all for her children—a love which knows neither time nor place nor limit.

The human heart is like an Eolian harp, tuned and trembling to the touch of every wind that whispers by, making music, sad or sweet, as the breeze shall blow.

Women and children are the great heart of the world. Without them, there can be no future. Helpless they may seem, but the very continuance and existence of all humanity hang upon them. Justice should have no sword sharper, more sudden, or surer than that which should be drawn against the heartless swindler who would condemn them to poverty and want, as in this case, or wear a sterner face than against the "careless Gallio," whose indifference has made possible the consummation of such crime.

There is in this record nothing whatever that calls in question the good character, which is shown by two witnesses and not contradicted, and the absolute good faith, of the unfortunate mother; nothing to mitigate the atrocious iniquity of the absconding swindler, and nothing to palliate the careless indifference of the defendant bank, which paid the plaintiff's money to the defaulter, though knowing she claimed it and was even then getting out proceedings to protect her rights.

The judge attached no importance to the defendant's *ex parte* dealings with the jury after verdict. It is no discredit to the plaintiff or her lawyer that she did not enter into competition along that line. The defendant should look to get the money back from the party to whom it was paid out by its own negligence, against the protest of the true owner.

In this case four opinions have been filed, but *Judge Brown*, being a stockholder in defendant bank, does not sit, and, the Court "being evenly divided, the judgment is affirmed." The opinions in favor of affirmation (like those of a contrary view) express the views of each writer only, the conclusion alone that there "being an even division, the judgment is affirmed," is the act of the Court, by operation of law.

In the English courts, until a recent period, each judge gave his opinion in every case, and this was true in the early Reports of this Court, and of the United States Supreme Court to a large extent. The custom of filing only one opinion, which is adopted by all the court (except when there is a dissent) was to save time, and also space in the volume of Reports, but it has always been open to any judge to express his views, whether he agrees with the majority or dissents, or when there is an even division of opinion.

The purpose to be served in filing opinions is to give the reasons actuating the Court, and this applies as much to dissenting opinions and to opinions on a divided court as where there is unanimous opinion. If the reasons given cannot be sustained, upon examination, by the bar and by public opinion, as sound, sooner or later the ruling is reversed by the Court itself, or is cured by legislation.

There is even more cause to give the views of the members where the Court is evenly divided than when one or two members dissent, for it is especially necessary when the Court is evenly divided that the reasons for differing conclusions reached by the members of the Court should be stated, that they may be considered and that the sounder reason, which, under our form of government, it is assumed, will ultimately control, may be adopted in some future opinion, or that legislation may cure the situation.

There is no decision or rule, nor, indeed, is there any power, in any court to control the vote or the expression of the views of any judge, whether by a dissenting or a concurring opinion, or when the Court is evenly divided. Indeed, an examination shows that opinions are more generally filed when the Court is evenly divided, and naturally so, because, as above stated, when the Court is evenly divided, the reasons urged on each side are more important to be given to the public, that on further consideration it may be determined where the right lies.

The first time that this Court laid down the doctrine that when the Court is "evenly divided the judgment below must be affirmed" was in *Durham v. R. R.*, 113 N. C., 240, in an opinion written by the writer of this. The Court did not lay down the rule that in such cases no opinions should be filed, but said, "The judgment below stands, not as a precedent, but as a decision in this case," and in all subsequent cases no different rule has been asserted. On the contrary, in *Ward v. Odell*, 126 N. C.,

946, there were two opinions filed—one on each side. In the same volume, *Boone v. Peebles,* p. 824, there was only one opinion, which was in favor of affirming the judgment, but it was stated in both cases that the Court was evenly divided, and therefore the judgment below was affirmed.

In *Durham v. R. R., supra,* in which the Court laid down this rule, five opinions from the United States Supreme Court and one from Massachusetts were cited as sufficient authority for the proposition, and in each of those, while the judgment below was affirmed, upon an evenly divided Court, opinions were filed.

The cases cited, first, were *Etting v. Bank,* 24 U. S. (11 Wheat.), 59, in which *Marshall, C. J.,* writes an opinion on the merits, which he concludes by saying: "The principles of law which have been stated cannot be settled, but the judgment is affirmed, the Court being divided in opinion upon it."

In the next case, *Benton v. Woosley,* 37 U. S. (12 Pet.), 27, *Taney, C. J.,* writes an opinion on the merits, but concludes by saying that, the Court being equally divided, the judgment below is affirmed. In *Holmes v. Jennison,* 39 U. S. (14 Pet.), 540, the Court writes an opinion affirming the refusal of a writ of *habeas corpus,* but states in the conclusion that it was done by a divided Court affirming the judgment below. Five judges filed opinions in that case, which was one of great importance, and 159 pages are taken up in reporting the case.

The next case cited in *Durham v. R. R., supra,* was an important one also—*Washington v. Bridge Co.,* 44 U. S. (3 Howard), 213, which affirmed the judgment by a divided Court, but there was an opinion for affirmance on the merits filed.

This Court also cited *Durant v. Essex,* 90 Mass. (8 Allen), 103, the opinion holding that a decision by an evenly divided Court affirming the judgment below, while not a precedent, has the "same efficacy in every respect as if the opinion had been rendered with all the judges concurring."

Since *Durham v. R. R.* was decided, in the famous income-tax case, *Pollock v. Loan & Trust Co.,* 157 U. S., 429, the judgment of the Court below was affirmed by an evenly divided Court. The report of that case occupies 226 pages, and two opinions were filed in affirmance and two for reversal. When that case came up on a rehearing (158 U. S., 601) the judge appointed to the vacancy voted for affirmance, but one of the judges who on the former hearing had voted for affirmance voted for a reversal, which was thus carried by a vote of 5 to 4. There were two opinions for affirmance filed, and all four of the dissenting judges writing opinions, among them the present distinguished Chief Justice of that Court. The report of the case occupies 215 pages. Never were dis-

senting opinions more valuable, for the American people have endorsed the views of the dissenting judges and written into the Constitution an amendment, without which it would have been impossible for this country to maintain the present great struggle for the maintenance of civilization and a democratic form of government on the earth.

Not to multiply instances, in *Downes v. Bidwell,* 182 U. S., 244, known as the "Insular Possessions Case," all nine of the judges expressed their views, the report of the case covering 154 pages. This was the case in which it was said that the Court had "filed nine dissenting opinions."

This Court has never held that it would file no opinion in any case, except on motions for "new trial for newly discovered testimony" (*Herndon v. R. R.,* 121 N. C., 498, and cases there cited, and citations in Anno. Ed.), and then only for the reason that, being not on the law, but purely upon the facts, which can never exactly recur in another case, an opinion would be of no benefit; but of course any judge has a right to file his views, even in such case, should he see fit. Even to *per curiam* decisions, which are decisions without any opinion by the Court, dissenting opinions have been filed, this matter being solely in the discretion of the judge. *Harkins v. Cathey,* 119 N. C., 658; *Wyatt v. Mfg. Co.,* 116 N. C., 272, and there are others. In *Thomas v. Fulford,* 117 N. C., 667, there were five opinions, no two of which agreed on all points.

The Court being evenly divided, the judgment of the Court below is affirmed. *Durham v. R. R.,* 113 N. C., 240, and citations thereto in Anno. Ed.

No error.

HOKE, J. I have given this case very careful consideration, and am of opinion that, on the record and verdict, the plaintiff is entitled to recover, and the judgment to that effect should be affirmed.

While fully recognizing the obligation and duty of a bank towards its depositor, the American courts have very generally held that when a bank has reasonable notice of a *bona fide* claim that money deposited with it is the property of another, it should promptly notify its depositor and withhold payment until there is reasonable opportunity afforded the claimant to institute legal proceedings in protection of his rights; and in some instances the bank itself is required before payment to institute proceedings and have the rights of the respective claimants determined. *Commission Co. v. Gerlock,* Mo. App., 326; *Juselli v. Riggs Bank,* App. D. C. Cases, 159; *Ry. Sav. Inst. v. Drake & Laing,* 25 N. J. Eq., 220; *Wayne Co. Bk. v. Airy,* 95 Mich., 520; 2 Mitchie on Banking, 976; Tiffany on Banking, 50.

By the verdict in the present case, it is established that plaintiff is the owner of the money deposited; that the bank knew that she claimed it,

and that the bank also knew at the time of payment that plaintiff was then engaged in taking out legal process to assert and protect her rights. She had made inquiry of the bank about this deposit on the day in question, at 10:30 a. m., accompanied by her attorney, one of the bank directors; and the cashier, refusing, not improperly, to inform her of conditions, himself gave decided intimation that her proper course was a resort to legal procedure. Leaving the bank for that purpose, the money was paid out to the husband during the day, between 1 and 2 o'clock, according to her testimony and that of her attorney; and in the meantime a woman, unacquainted in the town, having to arrange a bond and to procure money for attorney's charges and court fees. The entire evidence, to my mind, shows that no fair opportunity was allowed her to protect her interest, and that the payment to her husband was made in violation of her rights; and, to my mind, there is no conflict in the findings of the jury on issues 3 and 5½; the former, framed and designed to ascertain if the bank was aware at the time of payment that she was about to take out legal process; and the latter, whether she had notified the bank it was her money, explained the nature of her claim and requested it be held until she could have it attached. The entire charge of the court, and the different colloquies with the jury on the subject, show that issue 5½ was especially designed to determine whether she had requested the bank to hold the money, and that the jury so understood it.

On the record, I am of opinion, as stated, that the plaintiff's rights in the matter are clearly and directly established by the verdict of the jury on the first three issues, and the result is not affected by the finding on the last issue.

WALKER, J., dissenting from the affirmance of the judgment: It may be well doubted whether the plaintiff has shown that the fund in question did not belong to G. H. Miller, who was her husband. It was given to him to be used in the automobile business, and it would therefore seem that he had the right to deposit it where he pleased and in his own name. The defendant bank offered to show a very good reason for not depositing it in the bank at Belhaven, which was that there was a business rival who was an officer or an employee in that bank, and therefore he placed it in the Bank of Washington. Besides, plaintiff testified that the business was conducted in the name of G. H. Miller with her consent. And thus, again, she further testified: "I knew for at least two weeks that he had the money on deposit, in his own name, in the Bank of Washington, and I did not communicate with that bank, and said nothing about it until the 20th or 21st of July," when she went to the bank with her former attorney to get information about the deposit. She had dealings with the bank after Miller checked out the deposit, and made no complaint to the bank of its action in honoring his check until the latter

part of December following, when this suit was brought. It also appeared by the testimony of her former attorney that she had ample time to have attached the fund after she came to the bank, and before Miller presented his check against the same, about three hours. The same attorney testified that "The papers had been prepared and were waiting for her to come and sign them, and all that was needed to perfect them was her signature, and the advance payment of costs." That "they could have been served within half an hour." The bank extended indulgence to her afterwards on a paper it held against her, and she accepted it without protest or objection at that time or at any subsequent time, until she sued as to the payment of Miller's check on the deposit.

The jury returned the following verdict:

"1. When defendant bank paid check drawn by G. H. Miller, was plaintiff, Minnie Miller, equitable owner of the $800 referred to, as alleged? Answer: Yes.

"2. Did defendant bank, at time it paid check drawn by G. H. Miller for said $800, know that plaintiff, Minnie Miller, claimed to own said fund? Answer: Yes.

"3. Did defendant bank, when it paid said check, know or have reason to believe that plaintiff, Minnie Miller, was proceeding to have same attached? Answer: Yes.

"4. Did payment of said check by said bank cause plaintiff to lose said money? (No answer.)

"5. Is said bank indebted to plaintiff, Minnie Miller, and, if so, in what amount? Answer: Yes; $800, with interest on same from 21 July, 1916 (by the court).

"5½. Did plaintiff, Minnie Miller, before defendant paid out said money, notify said bank that it was her money, and why it was hers, and request said bank to hold it until she could have it attached? Answer: No."

It would appear that the answer to issue No. 2 and that to issue No. 5½ are conflicting, if the defendant was not entitled to a verdict on the issues as they stood. It surely cannot be successfully contended that a bank should hold a fund left with it and refuse to pay a check drawn against the deposit upon a promise to pay checks of the depositor, merely because some one enters the bank and claims the fund without any proof of or suggestion as to the nature of the claim, and that is all the first three issues decide. The knowledge of any claim at all may have consisted in no more than information that she would attach the fund. But here she had all of the necessary time, and failed, according to the testimony of the attorney, to act, when the time required was only one-half of an hour. Did not the bank have the right to infer, when Miller presented his check just before the bank's closing hour for the day—between 1 and 2 o'clock on 21 July, 1915—that if she really intended to attach

the fund when she was in the bank earlier in the day, she had abandoned her purpose, and she took no further action until she brought this action? The conduct of the plaintiff, under the circumstances, should estop her to claim that the bank was in default.

Mr. Morse, in his treatise on Banks and Banking, Vol. 1 (4 Ed.), says, at the close of section 343, p. 626: "Notice from the adverse claimant to the bank should not hold the property any longer than would be necessary for said claimant to push his rights directly against the depositor; that if he did so, he should have an order (attachment, garnishee, or injunction) from the court to the bank to retain the deposit until the question was settled, unless bond of indemnity be given; but that if he did not, within a reasonable time after notifying the bank, proceed against the depositor directly, the bank would be released from any obligation to him, and might act as though it had received no notice of his claim." Upon this authority of a standard text-book (see, also, Zane Banks and Banking par. 134), I need not discuss the difference between the English and American precedents upon this question. They are somewhat at variance. But, whatever the law may be on this question, I am of the opinion that, upon the verdict, the defendant was entitled to judgment, or, at least, to a new trial. The verdict does not find, under the first three issues, that the bank received any notice from the plaintiff of her claim. From all that appears in those issues and the answers thereto, the notice may have come to the bank in some other way; and as to the third issue, it may be said that the plaintiff was in fact not proceeding to attach the fund. If she threatened to do so, she did not execute her threat or begin to do so, but totally neglected to take any action after she left the bank, according to the testimony of her former attorney, who stated that she could have attached within one-half of an hour, as everything was ready for her signature. How could the bank have notice that something was proceeding to be done, when there was no proceeding, but instead an abandonment of all proceeding, or at least a negligent failure to proceed? *Lucus a non lucendo.* This evidence is not controverted. When no attachment was issued, after such a delay, why could not the bank itself proceed to act upon the belief that the claim was not a valid one and had therefore been withdrawn? The last issue finds that the plaintiff did not notify the bank of her title to the fund, and why it belonged to her; nor did she request the bank to hold it until she could have attached it, nor does it appear that she offered to indemnify the bank or save it harmless in any way. It is plain that the bank's position was a very delicate one, and it should not have dishonored Mr. Miller's check unless it had some reasonable ground to believe that the claim of the plaintiff was a valid one. As it is found by the jury, it had only notice of some kind of claim by Mrs. Miller, but none of its nature; and,

she having failed to attach or protect her interest, if she had any, within the usual time, or at least a sufficient time, it would follow that the bank should not have dishonored the check. Mere notice of a claim is not enough to charge the bank with this heavy liability, when the plaintiff could so easily have informed it of the facts in regard to her title, if she had any, and tendered indemnity to save it from loss, which is a most reasonable requirement, but this she did not do, and the jury have said that the bank "was not even notified that it was her money, and why it was hers, nor did she request the bank to hold the fund until she could attach it." If she had a claim to the money, then the bank was notified that it was hers, and in this respect the findings on the second and on the last issue are in direct conflict. This is also true as to the third and the last issues. All the information the bank had came from Mrs. Miller. The jury found, in answer to the third issue, that the bank "knew or had reason to believe" that Mrs. Miller was proceeding to attach; and yet, in answer to the last issue, they say that she made no request for the bank to hold the fund until it could be attached.

The verdict, if not in favor of the defendant, will be found, upon a careful interpretation by the light we derive from the circumstances of the case, to be conflicting, or at least so uncertain and confusing as to require a new trial in order to prevent what may be, and no doubt is, a great injustice to the defendant. It has paid the full amount once. Shall it be subjected to a double payment upon such a verdict, when the intention of the jury, if we say the least of it, is not clear? The jury would doubtless have answered the fourth issue "No" if the issue had not been withdrawn and the judge had not given the peremptory instruction to answer the fifth issue "Yes" and inserted the amount. I think the fourth issue should have been submitted to the jury or some similar one. They may have found that her loss, if any, was due to her own negligence in leaving the money in the bank after two weeks knowledge of its deposit there, or that she failed to act with ordinary diligence in attaching the fund; and there are other grounds upon which they could have given an answer favorable to the defendant upon such an issue.

I may add that when the jury were informed that the plaintiff claimed a judgment upon their verdict, they addressed the following paper to the court:

"NORTH CAROLINA—Beaufort County.

In the Superior Court—February Term, 1918.

(Title of cause.)

"*To* HONORABLE W. M. BOND, *Judge Presiding:*

"The undersigned jurors in the above entitled case, since they were discharged by the court, have been informed that the contention is now

made that their verdict is in favor of the plaintiff. If such contention is made, they respectfully represent to the court that it is contrary to the purpose and conclusion of the jury, who intended to find for the defendant, and acted upon the impression and understanding that issue 4, which they did not answer, and 5½, which they answered 'No,' were the vital issues; and if there is any inconsistency in the verdict in this regard, it does not represent the intention of the jury. R. B. Weston, H. G. Selby, J. S. Hodges, J. H. Woolard, Thad E. Adams, J. F. Thomas, Hilton C. Bowen, D. D. Harrison, A. T. Windlwy, L. B. Edwards."

I do not contend that this paper entitled the defendant, in law, to have the verdict set aside, because there is a general rule that a jury may not impeach their own verdict in such a way. But what the jury did is strong evidence in support of my view—that, upon the face of the verdict, their clear intention was to decide in favor of the defendant, because they thought that the answer to the last issue, which was the dominant and controlling one, was decisively in its favor and would entitle the bank to the judgment of the court. Even if the matter is in a state of doubt and uncertainty only, there should be another trial, so that the right of it may clearly appear.

The perilous position of the bank is shown by the two following cases: "It is clearly against public policy to permit a bank that has received money from a depositor, credited him therewith upon the books, and thereby entered into an implied contract to honor his checks, to allege that the money belongs to some one else. This may be done by an attaching creditor or by the true owner of the fund; but the bank is estopped by its own act." *Lockhaven First National Bank v. Mason*, 95 Pa. St., 113. "It requires neither argument nor authority to show that when a bank refuses the check of its depositor, drawn against funds, and pays the money over to a third party, it does so at its peril, and must assume the burden of proof to show not only that the money in question did not belong to the plaintiff (depositor), but also that it did not belong to the parties to whom the bank paid it." *Patterson v. Marine National Bank*, 130 Pa. St., 419.

The English rule is flatly against the plaintiff's right to recover, even upon the phase of this case most favorable to her, and this Court has never adopted or followed any other rule. It is the safer one and favors the free handling of commercial paper, and stabilizes the confidence of depositors in their banks. Any other rule would, in many cases, work injustice, and is not necessary for the protection of the claimant, who can easily save himself by prudent and prompt action in enjoining the bank or attaching the fund, or by enjoining the bank and making the

depositor a party, so that the controversy can be tried out, the respective claims adjusted, and the true owner of the fund ascertained, without subjecting the bank to a double liability.

The evidence is even stronger for defendant than we have so far stated it. The plaintiff admitted not only that her husband had told her, two weeks before the check was paid, that he had deposited the money in the Washington bank to his own credit, but she further said: "I saw the bank book on our desk, where we kept the business papers at the store. Miller had told me that he had deposited it to his personal credit, and the bank book showed it. I had access to the bank book." She told the cashier of the bank that "she had given her husband this money to go into the automobile business." She and her attorney, on the day they were in the bank making inquiry about Miller's deposits, asked the cashier, Mr. Ross, if Miller had any money there, and he replied that he had no right to divulge the confidential affairs of the bank or to tell anything about deposits, save to the depositor or his authorized representative, which was entirely proper, but he added that there was a legal way of getting the information. His conduct immediately afterwards, in discounting her paper and the accommodation he gave, showed clearly that he felt kindly towards her and was not trying to favor her husband as against her. Something has been said about the difficulty of Mrs. Miller's securing a bond for the attachment. The attorney testified that he had agreed to sign the bond and that she was to go to the bank, discount her note, and pay the small amount of advance fees for the attachment. The bank did discount her note, she had the money to pay the fees, and the bond and other papers were ready for her. She had nothing to do then but to sign the papers, as the attorney stated. But she did not go back to his office until too late. The bank was not in default, therefore, but the attachment was not issued because of her own delay. If she had returned to his office, as she promised to do, she would have saved her money, if, upon the facts, it really belonged to her instead of her husband.

I also am of the opinion that the court erred in excluding the proposed testimony as to why G. H. Miller had deposited the money in the Bank of Washington instead of the Bank of Belhaven, the reason given being that there was a business rival in the Belhaven bank who would learn of his business secrets. The fact that he placed the money in the Bank of Washington has been used against the defendant as a suspicious circumstance, and it was entitled to have this evidence admitted to rebut any prejudicial inference that might be drawn from it.

The cases cited in the opinions for affirmance are not in point, because the facts upon which they were decided are not the same as those to be

found in this record. It will not be denied that, under certain circumstances, a bank many be held liable for paying money to the depositor upon his check, but we have no such case here; and, besides, upon the face of the verdict, especially when the latter is construed in connection with the evidence and the charge, the jury clearly intended to decide with the defendant, or there is so much doubt about the matter that it would be just to order another trial.

I have confined my discussion of this case strictly to the law, as is proper for me to do, and have therefore made no reference to extraneous matters, with which I am not concerned. They are not judicial questions, and are entirely foreign to the matter presented for our decision.

ALLEN, J., dissenting from the affirmance of the judgment: The questions presented by the appeal are purely legal, and it obscures rather than aids their correct solution to consider the parties and their needs.

If the plaintiff is a married woman, one of whose husbands committed suicide and the other ran away from her, this may furnish a reason for sympathy, but none for allowing her to recover from the defendant money which it has already paid to her husband, unless the record justifies it; and when the verdict is considered in connection with the charge, which is the proper rule of construction, it seems to me clear that there is an irreconcilable conflict between the findings on issues 3 and 5½, and, if so, there must be a new trial.

The verdict is as follows:

"1. When defendant bank paid check drawn by G. H. Miller, was plaintiff, Minnie Miller, equitable owner of the $800 referred to, as alleged? Answer: Yes.

"2. Did defendant bank, at time it paid check drawn by G. H. Miller for said $800, know that plaintiff, Minnie Miller, claimed to own said fund? Answer: Yes.

"3. Did defendant bank, when it paid check, know or have reason to believe that plaintiff, Minnie Miller, was proceeding to have same attached? Answer: Yes.

"4. Did payment of said check by said bank cause plaintiff to lose said money? (Answer withdrawn by court.)

"5. Is said bank indebted to plaintiff, Minnie Miller, and, if so, in what amount? Answer: Yes; $800, with interest on same from 21 July, 1916 (by the court).

"5½. Did plaintiff, Minnie Miller, before defendant paid out said money, notify said bank that it was her money, and why it was hers, and request said bank to hold it until she could have it attached? Answer: No.

His Honor charged the jury on the third issue as follows:

"Now, gentlemen, it isn't necessary, in order to fix that bank with her intentions, that either Mr. McMullan or Mrs. Miller should have said, in exact words, 'I am going to attach the money.' The meaning of that issue is, Did either of them, by what they said or did, do anything that was reasonably calculated to put Mr. Ross on notice that they were going to start some sort of a proceeding to keep Mr. Miller from getting that money out of the bank? . . . If you find from the greater weight of the evidence, if the bank knew or had reason to believe that Mrs. Miller intended to start legal proceedings which would prevent the bank from paying out that money, and knew that, or had reason to believe it at the time they paid that money, and you find that these facts are shown by the greater weight or preponderance of the evidence, you should answer it 'Yes'; otherwise, 'No.'"

He also charged the jury on issue 5½ as follows:

"The plaintiff contends that, taking all of the other circumstances in logical connection, that, starting out with the fact that she came here for that purpose from the town in which she lives; that she had had a consultation with a lawyer the day before; that he had referred her to a lawyer here; that when she came she went immediately to the lawyer here, to whom she had been referred; that she and her lawyer went to the bank; that after the conversation took place, she left the bank, and that without her seeing Mr. Ross any more, that Mr. Ross phoned Mr. McMullan to the effect that the money had already been drawn out, and she contends that, putting all of these facts together, that you ought to find that Mr. Ross was told enough in that bank by her to let him know that she claimed the money, and that she wanted him to hold it for her a reasonable time, and not pay it out, so that she could assert her rights, if any, to the fund."

The jury could not agree, and came into the court for further instructions, when the following colloquy took place:

Juror: "I wanted to know whether we would have to believe that she directly forbid his paying the money to him, or if from her conversation would lead him to believe.

(Court: "If what she said and did indicated to him or was reasonably sufficient to indicate to him that she wanted that money kept there until she could tie it up, that would be the same thing as telling him in plain language." . . .)

The jury again came into court, when the following proceedings were had:

Court: "Have you agreed on all of the questions?"

Juror: "No, sir."

Court: "Have you agreed on any of them?"

Juror: "No, sir. I think, about the first three could be agreed on, but the main important one is the one we can't agree on."

The jury came into court a third time, when the following proceedings were had:

Court: "I want to ask you, gentlemen, how many of the issues have you agreed on?"

Juror: "We have agreed on the first issue. The last one is the main tangle, though. Mr. Bowen wants you to explain that last issue."

Juror Bowen: "I said I could answer it directly if it wasn't for the charge you stated to us."

These two charges embody the same facts and are substantially alike, and the jury was instructed, under each issue, that it was not necessary for the plaintiff to use any particular words, but that if her language was such as reasonably to lead the bank to believe that she wanted the money held until she could take out legal proceedings, the issues should be answered "Yes"; and still the third issue was answered "Yes," and issue 5½ "No."

In other words, when the record is read as a whole and the verdict is construed with the charge, the jury has found in answer to issue 3 that the conduct of the plaintiff was such as reasonably to lead the defendant to believe that she wanted the money held until she could begin legal proceedings, and, in answer to issue 5½, that her conduct would not lead to this result.

The explanation of this conflict is, that the issues are not identical and the jury was confused by the charge, as is shown by the fact that they asked for further instructions three times on issue 5½, and that ten of the jury signed a paper stating that they thought their verdict was in favor of the defendant.

The evidence of the plaintiff's title to the money is also unsatisfactory, and, upon the whole record, I think justice demands a new trial.

NOTE.—While Justices WALKER and ALLEN hold to the view that no opinions should have been filed in this case because the Court was evenly divided as to what the decision should be, they dissented from the affirmance of the judgment and deemed it proper to express their reasons therefor, as opinions were filed to sustain the opposite view of the case.

B. J. ROUSE ET AL. V. E. R. ROUSE, TRUSTEE, ET AL.

(Filed 9 October, 1918.)

1. **Trusts and Trustees—Uses and Trusts—Adverse Claim—Limitation of Actions—Statutes.**

The statute of limitation will begin to run in bar of the rights of the *cestui que trust* from the time the trustee, with the knowledge of the *cestui que trust*, disclaims the trust, either expressly or by acts necessarily implying a disclaimer.

2. **Trusts and Trustees—Uses and Trusts—Active Trusts—Passive Trusts—Execution of Trusts—Statute of Uses—Right of Entry.**

A conveyance in trust to donor's son to pay over rents and profits to the donor for life, and a certain amount thereafter to donor's wife in lieu of dower, and then directs a conveyance to donor's children, creates an active trust until the death of the wife, and thereafter it becomes passive, whereunder the heirs at law may demand the conveyance or enter upon the lands without it.

3. **Same—Limitation of Actions—Statutes.**

Where a trust has become passive, entitling the heirs at law to a conveyance, or entry without it, and the trustee continues in possession of the lands under deeds from the heirs at law, theretofore obtained, he holds adversely to the heirs at law, in the sense that the statute of limitations will begin to run, and his continued adverse possession for the statutory periods will bar their right of action, when they are under no legal disability.

4. **Trusts and Trustees—Uses and Trusts—Ouster—Equity—Laches.**

The inaction of the *cestui que trust* for eleven years after the trustee has claimed the trust lands as his own, under deeds he has acquired from them, will bar their right of recovery in equity by their laches, when they are under no legal disability.

5. **Trusts and Trustees—Title.**

The trustee of an active trust must retain the title and control of the lands, subject to the trust, in order to execute the user therein designated.

ACTION tried before *Allen, J.*, at June Term, 1918, of LENOIR, upon these issues:

1. Is B. J. Rouse estopped to claim an estate in the land described in the complaint? Answer: Yes.

2. Is B. J. Rouse barred by the lapse of time to assert a right to any interest in the said land, as described in the complaint? Answer: Yes.

3. Is B. J. Rouse barred by the statute of limitations to maintain this action? Answer: Yes.

Similar issues were submitted as to the other plaintiffs.

The court rendered judgment that defendants go without day and recover costs. Plaintiffs excepted and appealed.

G. V. Cowper, Moore, Dunn, Whitaker & Hamme for plaintiffs.

Guy V. Moore, A. D. Ward, Dawson, Manning & Wallace, and Manning & Kitchin for defendants.

BROWN, J. This action is brought by plaintiffs, as the heirs of W. J. C. Rouse, to recover possession of certain lands of defendant E. R. Rouse and his co-defendant in possession thereof, to compel defendant E. R. Rouse to execute conveyances of same, and for an accounting for the rents and profits.

The defendants denied the right of plaintiffs to recover, and pleaded specifically the several statutes of limitation.

The court instructed the jury that if they believed the evidence they should answer each of the issues "Yes." If such instruction is correct, then the action is barred by the statute of limitations, and the judgment must be affirmed.

On 13 January, 1887, W. J. C. Rouse and wife, Martha, executed to their eldest son, E. R. Rouse, defendant in this action, a deed for a tract of land described in the pleadings, containing the following provision:

"But upon this special trust, that the said E. R. Rouse shall have and hold the said granted premises for the use and benefit of the said W. J. C. Rouse and his wife, Martha Rouse, upon the following conditions: That the said E. R. Rouse shall rent and lease the said land and pay out of rents and profits thereof to the said W. J. C. Rouse during his life, and, in the event that he should die, leaving his wife surviving, then and in that event the said E. R. Rouse shall pay to her, the said Martha Rouse, the sum of $100 dollars annually out of the rents and profits of the lands in lieu of her dower; the residue of the rents and profits he shall pay over and distribute *pro rata* among the heirs of W. J. C. Rouse. That upon the death of the said W. J. C. Rouse and his wife, Martha Rouse, the said E. R. Rouse shall convey said land to the heirs of W. J. C. Rouse in fee simple. The heirs shall share alike, except E. R. Rouse, who shall first account for 30 acres hereto deeded him by his father. That the said W. J. C. Rouse and wife, Martha Rouse, shall have the use and occupying of the dwelling-house for and during their natural lives."

It is admitted that Martha Rouse survived her husband many years and died on 30 May, 1905.

This action was commenced on 12 September, 1916.

The deed in trust to E. R. Rouse was before this Court in the case of *J. W. Rouse v. E. R. Rouse*, 167 N. C., 209. The interest of J. W. Rouse in the land had been sold under execution in March, 1889, during the lifetime of Martha Rouse, and purchased by defendant E. R. Rouse. We held that the interest of J. A. Rouse could not be sold under execu-

tion during the lifetime of Martha Rouse, and that as long as she lived the trust was an active and not a passive trust; that during her life the trustee held the lands in trust for the purpose of collecting the rents and profits and paying them over to the beneficiary.

It was evidently the intent of the grantor in the deed that the legal title should remain in the trustee during the widow's life, to the end that he might execute the uses designated. He could not execute such uses without retaining the title, possession, and control of the land.

In that case we held that during the life of Martha Rouse the trust was active and not executed by the statute, and further interest of the *cestui que trust* could not be sold under execution.

It is therefore manifest that defendant could acquire no title by adverse possession during the lifetime of Martha Rouse.

But when Martha Rouse died, in May, 1905, the trust became a mere passive trust, the active control and management of the trustee ceased, and the children of the trustor, W. J. C. Rouse, had the right to call on the trustee to execute deeds for the property according to the terms of the trust, and without such deeds they had the right of entry upon the property and the right to oust the trustee from possession. At her death the statute executed the use, and the legal title as well as the equitable became vested in the ten children of W. J. C. Rouse and their representatives.

In the case referred to, we said that the *cestui que trusts* had no right to demand a conveyance and no cause of action against E. R. Rouse *"until after the death of Martha Rouse."*

The evidence shows conclusively that the plaintiffs and those under whom they claim put an end to this trust relation, so far as they were able to, during the life of Martha Rouse, and that defendant E. R. Rouse acquired their interest in the land and put the deeds upon record. At date of her death plaintiff knew that he remained in possession of the land adversely, claiming it as his own. No demand was made upon him to execute a deed or to account for rents and profits until this action was brought, over eleven years after the expiration of the life interest, when the cause of action accrued. It is a general rule that, as between trustee and *cestui que trust,* lapse of time is not a bar to an action, but where the trustee disclaims the trust, to the knowledge of the *cestui que trust,* either expressly or by acts necessarily implying a disclaimer, and the trustee remains in unbroken possession, lapse of time may be relied upon as a defense. *McAden v. Palmer,* 140 N. C., 258; *Williams v. Church,* 1 Ohio St., 478; *Cox v. Carson,* 169 N. C., 137.

If these plaintiffs had any enforcible equity against defendant, they have slept on their rights for more than ten years, and they are guilty of such laches that a court of equity will not lend its aid. As said by *Jus-*

tice Gray, in *Speidel v. Henrici,* 120 U. S., 387: "Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them."

In *Cox v. Carson, supra,* it is said by *Justice Walker* that the statute begins to run when the trustee disavows the trust with the knowledge of the *cestui que trust,* or holds adversely to the claim of those he represented, citing *Bacon v. Rives,* 106 U. S., 107.

The case of *Cherry v. Power Co.,* 142 N. C., 406, is in point and sustains the conclusion that, upon all the evidence in this case, the statute began to run at death of Martha Rouse.

Therefore, whether the seven- or ten-years limitation be applied, none of plaintiffs being under disability, the action is barred.

No error.

J. S. WILLIAMS AND J. J. BOWDEN v. CAPE FEAR LUMBER COMPANY.

(Filed 9 October, 1918.)

1. Appeal and Error—New Trial—Evidence—Tort.

When the Supreme Court, on appeal, has only decided that an instruction of the lower court, in effect, that the defendant would not be liable for damages in trespass for its grantee's cutting other trees than those it had conveyed, was erroneous, the question of whether the defendant participated in the alleged wrongful act was left open for the new trial, and evidence relating thereto may be introduced thereon, the competency of such to be then passed upon.

2. Torts—Joint Tort Feasors—Evidence.

Where an injury is caused to another by a wrong committed by different parties who owe him the same duty, and their acts naturally tend to a breach thereof, the wrong may be regarded as joint, for which both of the parties committing it may be held liable as joint tort feasors; and the joint tort may be shown by direct proof or by circumstantial evidence, such as the relationship of the parties, their dealing with each other, and their acts and conduct before and after the tort, when relevant to the inquiry.

3. Contracts—Torts— Timber— Deeds and Conveyances— Evidence —Questions for Jury.

Where the action is to recover damages of the defendant for cutting timber not conveyed in the plaintiff's deed, and there is evidence tending to show that such injury was wrongfully caused by the defendant's grantee, it is competent to show, as to the joint tort, that the defendant and its grantee were corporations chartered by the laws of the same State, had offices in the same building, with many stockholders and some officers common to both; that the defendant's president was the general manager

of its grantee corporation; that the grantee corporation had cut the timber unlawfully for a considerable period, and in settlement, though made through a trust company, had to account to the defendant's officer, the amount to be determined by the number of all trees cut by a certain rule agreed upon, the amounts returned to the trustee including those for trees so unlawfully cut.

4. Principal and Agent—Respondeat Superior—Contracts—Torts—Damages—Corporations.

Where there is evidence tending to show that the tort complained of was committed by a corporation under contract with the defendant corporation, and while the work was under the management or control of an officer of them both, the acts and knowledge of such officer in respect to the facts and circumstances under which the tort had been committed will be imputed to the defendant, his principal, as its own, under the principle of *qui fecit per alium fecit per se.*

5. Same—Fires.

Where a corporation, as grantee of defendant corporation of certain timber, has negligently set out fires to the lands of the plaintiff, the defendant's grantor, by the operation of its engines used in cutting the timber, under the charge of an officer of both corporations, the acts of the officer for both corporations will be imputed to the defendant.

6. Contracts—Independent Contractor—Dangerous Instrumentalities—Fires—Damages—Principal and Agent.

A principal may not escape liability for damages caused by an independent contractor, when the work, under the contract, contemplates the use of instrumentalities dangerous to the rights of others—in this case, damages to the land of the owner from fires negligently set out by an engine in cutting the timber therefrom.

7. Pleadings—Admissions—Information and Belief.

Admissions in the answer as to matters alleged on information and belief in the complaint are admissions of the matters so alleged, and not confined to the fact that the defendant has been so informed and believes them.

ACTION tried before *Calvert, J.*, and a jury, at March Term, 1918, of DUPLIN.

The action was brought to recover damages for cutting and burning timber belonging to plaintiff's testator, and the case was before this Court at Fall Term, 1916. It is reported in 172 N. C., at p. 297, where the principal facts are stated, as they then appeared. We awarded a new trial at that term, and the case was again tried below, when the jury returned the following verdict upon issues then submitted by the court:

1. Did the defendant Cape Fear Lumber Company wrongfully cut and remove timber and trees of plaintiff's testator, R. J. Williams, as alleged? Answer: Yes.

2. If so, what damages are plaintiffs entitled to recover by reason thereof? Answer: $2,000, with interest from 1 August, 1911.

3. Did defendant Cape Fear Lumber Company wrongfully set fire to and burn and injure the R. J. Williams, Brown, place and the timber trees, lightwood, straw, and woodsmold thereon, as alleged? Answer: Yes.

4. If so, what damages are plaintiffs entitled to recover by reason thereof? Answer: $1,500, with interest thereon from 4 July, 1911.

5. Did the defendant Cape Fear Lumber Company wrongfully set fire to and burn and injure the part of the R. J. Williams home place, near the gin, and the timber, trees, lightwood, straw, and woodsmold thereon, as alleged? Answer: Yes.

6. If so, what damages are plaintiffs entitled to recover by reason thereof? Answer: $200, with interest from 1 July, 1911.

The judgment was rendered upon this verdict, and defendants appealed.

The other facts necessary to be stated will be found in the opinion.

H. D. Williams, W. F. Ward, and A. D. Ward for plaintiffs.
Langston, Allen & Taylor and Stevens & Beasley for defendant.

WALKER, J., after stating the case: When this case was before us at a former term the discussion was restricted to an instruction of the court with respect to the deed from the defendant to the Camp Manufacturing Company, as bearing upon the liability of the defendant for cutting the trees, the lower court then holding, by its instruction, that any trespass committed by the Camp Manufacturing Company, under the authority of that deed, by cutting trees on the land not conveyed thereby, would be considered as the act of the defendant, and make it liable to the plaintiffs for such unlawful act or wrong. The jury were then instructed that, under these facts, if found by them, they should answer "Yes" to the following issue: "Did defendant Cape Fear Lumber Company wrongfully cut and remove timber and trees of plaintiffs' testator, R. J. Williams, as alleged?" and the jury responded to the issue in the affirmative under that instruction, the fact as to the cutting of the timber by the Camp Manufacturing Company not being seriously questioned, the defendant contending that an entry by the Camp Manufacturing Company under the deed, and cutting the timber, would not of itself have the effect in law given to it by the court. And we so held, for the reasons stated in the opinion of the Court, this being substantially all the Court decided; and for this error alone the new trial was ordered. This will more clearly be seen from the following language of the Court:

"The instruction of the court, when considered in connection with what precedes it, and the reference in the instruction to trees under a

certain dimension, which is mentioned in the deed, being cut by the Camp Manufacturing Company, shows that it had reference to the authority given to said company by the deed to cut trees; and as thus treated, it was too broad. The Camp Manufacturing Company could cut, under the terms of the deed, only such trees as are described therein, and if it cut other trees the appellant would not be liable therefor unless it gave some authority apart from the deed to do the act. Its authority given by the deed to cut trees of a certain dimension did not, of course, extend to trees not of that kind, and the Camp Manufacturing Company would be liable alone for the trespass if it did cut other trees, in the absence of any proof showing that the appellant participated in the cutting or was in some way connected with it."

And again in another part of the opinion: "The Camp Manufacturing Company was authorized by the deed to enter upon the land and cut and remove trees, but not trees which did not come within the description of the deed; and for this reason the instruction was calculated to mislead the jury as to the law and the nature of the appellant's liability for the trespass of the Camp Manufacturing Company, if there was any liability on its part. The instruction, as we have said, manifestly referred to an entry upon the lands under the deed to cut timber, and this extended the appellant's liability for the excessive acts of the other company beyond its legitimate scope."

In regard to the receipt of rent by the defendant from its grantee, we said: "The acceptance of rent, without any knowledge of the sources from which it came, or for what it was given, would not create liability for the tort or trespass of the Camp Manufacturing Company, as we have seen by the above reference to 38 Cyc., 486. The receipt of the money must be such as would amount to a ratification of the trespass, or, under some circumstances, it might be evidence of a participation therein. The instruction requested by the appellant is correct in principle, and should have been given unless it has been extended to too many of the issues. We do not see now how it affects the seventh issue. If the appellant did nothing more than convey the trees he then owned of a certain kind and dimension, and merely received the price *therefor,* we do not see how it can be liable for the trespass of the Camp Manufacturing Company in cutting trees not described in the deed. . . . Plaintiff may be able to show that, under all the facts and circumstances of the case, the jury should find that there was concert of action between the companies or that the appellant did so act as to authorize the trespass, and if it did not do so originally, it has since so acted as to ratify or endorse it."

It appears that this Court did not undertake to decide at that time what was the legal effect of the evidence as it then stood—that is,

whether there was any to prove a joint trespass, apart from the deed and entry thereunder by the Camp Manufacturing Company—but confined itself solely to a construction of the deed and to the effect of the mere cutting of timber by the grantee after he had entered upon the land under the deed, without passing upon the question as to the sufficiency of the evidence, in law, to show a concert of action between the two companies, or, in other words, a joint trespass. That matter, therefore, was left fully open for present consideration, without our being controlled by the former decision, or even embarrassed by anything said in the opinion of the Court. We merely held that, in view of the terms of the deed then being construed, the instruction of the court to the jury concerning the same was too broad, and therefore misleading. Very different, though, is the question presented now, when we are to inquire and declare whether there is *any* evidence tending to show that the defendant participated in the tortious act of the other company which was committed when it cut trees not conveyed by the deed.

When two or more are engaged in an unlawful enterprise which causes damage to another, each is individually responsible for all injuries committed in its prosecution, and this although the specific injury was done by one of the parties alone, the liability of the other being founded upon the concert of action. 38 Cyc., 487; *Smithwick v. Ward,* 52 N. C., 64; *Grigg v. Wilmington,* 155 N. C., 18; *C. V. Coal Co. v. Wilson,* 67 Ill. App., 443. So when different parties owe the same duty, and their acts naturally tend to the same breach of that duty, the wrong may be regarded as joint and both may be held liable. 38 Cyc., 483; *E. L., etc., Co. v. Hiller,* 203 Ill., 518.

When there is community of fault, the rule of joint liability applies, and the parties concerned are joint tort feasors. This joint concert or agreement may, of course, be established, not only by direct proof of the facts going to create it, but by circumstantial evidence. The relations of the parties may be considered, and their dealings with respect to the property upon which the tort is committed, and also their acts and conduct before and after the commission of the tort. These corporations were evidently closely allied in interest. They were chartered in the same State, and their domicile was then in the same town (Franklin, Va.), and the same house, where they had their principal office. They were both engaged in the same kind of business, and some of the officers of both companies were the same, Mr. J. L. Camp being the president of one, the defendant in this case, and vice-president and general manager of the other, and many of the stockholders were common to both. Then there is the circumstance that this unlawful cutting was being done for a considerable period of time, from which it would be inferred that if the defendant had looked after its business with any reasonable care and

oversight, it had some knowledge of what was going on. It had a direct and important interest in the cutting, at least to the extent of stimulating inquiry as to how it was being done, for it could not know whether it was receiving its proper rentals, through the Atlantic Trust and Banking Company, at Wilmington, N. C., without some such knowledge on its part. The Camp Manufacturing Company was to be the debtor of the defendant for all trees cut under the deed, the amount to be determined by the number cut and by a certain rule agreed upon. But whether this was being done according to the contract was a matter which deeply interested the defendant, and it would not be apt, as a prudent business concern, to leave the calculation of the amount due, or of the number of trees cut, to the sole judgment of the other company, whose interest was, in this respect, adverse to its own. This would not be in accordance with the ordinary business rule. The returns were made by the Camp Manufacturing Company to the trust company, but how could the defendant know of their correctness unless it had itself, or through some person acting for it and having its confidence, investigated the matter and verified the returns, or have been in some way assured of their accuracy? If its officer was left in charge of the cutting, the inference might fairly be drawn by the jury that he gave the company all the information concerning what was being done on the land. It is hardly to be conceived that the defendant managed its business so loosely and carelessly as not to know from what particular source the various sums came, which were, from time to time, being paid by the Camp Manufacturing Company to the trust company at Wilmington; that it caused no tally or audit to be made, or no report to be sent in to it of how many trees, with the sizes, were being cut on the land, but relied altogether and implicitly on the returns to the trust company, without any investigation whatever and without checking up the account. There are other circumstances which more or less go to show knowledge. That such a course was taken would tax to the utmost the simple faith of the most credulous and confiding. There are other circumstances which more or less go to show knowledge of what was actually done; and, further, that the relations between these companies was so intimate and confidential as to give some assurance that they had a common interest in their affairs, although in the disguise of separate and distinct corporate names.

The law does not look merely at the form of things, but seeks to lay bare the real transaction. We have been told that there is nothing in a name, and it also is true that there may be nothing in two, which signifies a real plurality of beings, or entities. We are not saying, or even intimating, that the two names were used to deceive or to conceal the real status, but the plaintiffs had the right to show and convince the jury, if they could do so, that there was in fact but one company though having

two names. If it was but one entity, the defendant is liable for the trespass, because manifestly it would then be chargeable for its own act; and if there were two companies, in fact as well as in name, then their business relations and the other circumstances in evidence might be considered to determine whether they were actually working together to the same end—sharers in the same enterprise, and, therefore, in all of the responsibilities and liabilities growing out of it. But the question is not only whether there was one company, but whether, if there were two, they united in committing the tort.

It would be vain to analyze the evidence more closely, or to state it more fully, as no useful precedent would be established for guidance in any other case, upon the question of its legal sufficiency, if we should do so. We need only say that there was some evidence, and at least more than a scintilla, for the consideration of the jury. We may add, though, that if J. L. Camp was placed in charge of the work by both companies, if there were two, then, being their agent, his knowledge of the cutting, and his acts, would be imputed to his principals as their own. *Qui facit per alium facit per se.*

What we have said applies as well to the burning of the timber, and, besides, if J. L. Camp represented both companies and knew the plaintiffs' property was exposed to danger from fire by the engines used in the cutting of the timber, the defendant would be liable for the consequent burning of the same. The Camp company was authorized to do the work in this way, by using an engine—a dangerous instrumentality—and even if an independent contractor, as contended by defendant, it would still be liable for his acts and the damage which was caused by his acts. *Thomas v. Lumber Co.*, 153 N. C., 351. It was said in *Davis v. Summerfield*, 133 N. C., 325: "There is still another class of cases to be excepted from the exemption, and that is where the contract requires an act to be performed on the premises which will probably be injurious to third persons if reasonable care is omitted in the course of its performance. The liability of the employer in such cases rests upon the view that he cannot be the author of plans and actions dangerous to the property of others without exercising due care to anticipate and prevent injurious consequences." In *Bower v. Peate*, 1 Q. B. Div. (1875-6), p. 321, *Chief Justice Cockburn* thus states the rule: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to

do the work from which the danger arises or some independent person—to do what is necessary to prevent the act which he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." The authorities are fully collected in *Thomas v. Lumber Co., supra,* and no further comment or citation of authorities is necessary, except to state that *Thomas v. Lumber Co., supra,* has frequently been approved by this Court, and notably in the recent cases of *Dunlop v. R. R.*, 167 N. C., 669, and *Strickland v. Lumber Co.*, 171 N. C., 755. In the case last cited the Court sets out the quotation in *Thomas v. Lumber Co., supra,* from *Bridge Co. v. Steinbrock,* 61 Ohio St., 215 (76 Am. St., 375), as follows: "The weight of reason and authority is to the effect that where a party is under a duty to the public or a third person to see that work he is doing, or has done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid liability in case it is negligently done to the injury of another (citing numerous authorities). The duty need not be imposed by statute, though such is frequently the case. If it be a duty imposed by law, the principle is the same as if required by statute. *Cockburn, C. J.*, in *Bower v. Peate, supra.* It arises at law in all cases where more or less danger to others is necessarily incident to the performance of the work let to contract, that raises the duty and which the employer cannot shift from himself to another so as to avoid liability, should injury result to another from negligence in doing the work." So it was held in *Heilig v. Jordan,* 53 Ind., 21 (21 Am. Rep., 189), that where the owner of real estate on which there is a kiln for drying lumber leases with knowledge that the kiln will be used by the lessee for that purpose, and knowing, or having reason to know, that such use will be dangerous to an adjoining house, he is liable to the owner of such adjoining house if it be burned by fire communicated from the kiln while managed by the lessee. "Whoever, for his own advantage, authorizes his property to be used by another in such manner as to endanger and injure unnecessarily the property or rights of another is answerable for the consequences. Sometimes the liability has been referred to the law of nuisance, but it exists when predicated upon negligence equally as when predicated upon an intentional wrong." *Boston Beef Packing Co. v. Stevens,* 12 Fed., 279, 280.

"One who demises his property for the purpose of having it used in such a way as must prove offensive to others may himself be treated as the author of the mischief." 38 Cyc., 482, and note 84; *Fish v. Dodge,* 4 Denio (N. Y.), 311.

The case seems to have been tried on its merits, and the verdict is well sustained by the proof. The charge of the court was comprehensive and clear, and in some respects more favorable to the defendant than it had a right to expect. It would serve no useful purpose to consider the exceptions one by one. We have discussed the salient points of the case—those that are the essential ones—which is all-sufficient. Defendant received the proceeds from the unlawful cutting and has not given them up, nor, so far as appears, does it propose to do so, after full knowledge of the facts.

We do not assent to the defendant's construction of the allegation of section 7 of the complaint, and the admission thereof in the answer. It would be giving a very narrow interpretation of the real meaning and scope of the admission if we should hold that it was merely an admission that plaintiffs had been informed of the facts alleged. It is an admission of the matter alleged, though the allegation is based on information and belief. *Kitchin v. Wilson,* 80 N. C., 195; *Gardner v. Lumber Co.,* 144 N. C., 110, 113. What plaintiff alleged was that defendant owned the trees at the time of the trespass, and this is what was admitted. The long course of dealing with and in making returns to the trust company through J. L. Camp, and the latter's deposition, furnished sufficient evidence, which is at least *prima facie* of his authority to make the reports and of their genuineness. It may be that the defendant did not actually participate in the wrong charged against it, but we are bound by what is stated in the record, and we are unable to hold that there is no evidence of such participation.

We have carefully examined the numerous exceptions taken by the defendant, and the evidence and charge of the court, and find no substantial error of which the defendant can justly complain.

No error.

J. L. KILPATRICK, ADMINISTRATOR OF NINA A. KILPATRICK, v. ZEPH KILPATRICK.

(Filed 9 October, 1918.)

1. Husband and Wife— Married Women— Contracts— Separate Property— Constitutional Law.

The real property of the wife, whether acquired before or after marriage, remains her sole and separate property (N. C. Const., Art. X, sec. 6), and therein the husband has no vested interest, but merely the power to refuse his written assent to her conveyance thereof.

2. Husband and Wife—Married Women—Conveyance to Husband—Probate —Certificate—Statutes.

Where the wife has conveyed her lands with her husband's written consent, and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction to secure notes given in part payment of the purchase price, payable to herself and husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of Revisal, sec. 2107, making a contract between husband and wife void which changes a part of her real estate or impairs the body of the capital of her personal estate unless in writing, etc., and unless it appears in the probate, to the satisfaction of the officer, "that the same was not unreasonable or injurious to her," etc.

3. Same—Executors and Administrators—Descent and Distribution.

In an action by the personal representative of the deceased wife to recover notes from her husband that were given in consideration of a sale of her real property, with mortgage back, and payable jointly to her husband and herself, but void under the provisions of Revisal, sec. 2107: *Held*, the administrator is entitled to recover them to settle the estate of the decedent and for distribution among her next of kin. The husband, the defendant in this action, may not hold the same under the recent statutes of distribution (ch. 166, Laws 1913, amended by ch. 37, sec. 2), but is entitled only to his distributive part through the administration.

APPEAL by both parties from *Allen, J.*, at chambers, in Kinston, 12 September, 1918, from a judgment upon an agreed state of facts in a controversy submitted without action.

Y. T. Ormond for plaintiff.
Dawson, Manning & Wallace for defendant.

CLARK, C. J. It appears from the agreed statement of facts that on 1 November, 1913, Nina A. Kilpatrick, being the owner in fee simple of a tract of land, conveyed the same, with the written assent of her husband, to one B. W. Waters by deed duly recorded, and that "on the same day and as a part of the same transaction," the said B. W. Waters executed nine bonds for the purchase price of the land, one falling due each year, and made them payable to the said Nina A. Kilpatrick and her husband, each for the sum of $200, and to secure the same executed a mortgage on the said tract of land.

It was further agreed "said bonds were executed to Zeph Kilpatrick and his wife, Nina A. Kilpatrick, by consent and agreement of all parties to the transaction."

Revisal, 2107, provides: "*Void without approval of probating officer.* No contract between a husband and wife made during coverture shall

be valid to affect or charge any part of the real estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract, or to impair or change the body or capital of the personal estate of the wife, or the accruing income thereof, for a longer time than three years next ensuing the making of such contract unless such contract shall be in writing, and be duly proved, as is required for conveyances of land; and upon the examination of the wife separate and apart from her husband, as is now or may hereafter be required by law in the probate of deeds of *femes covert*, it shall appear to the satisfaction of such officer that the wife freely executed such contract, and freely consented thereto at the time of her separate examination, and that the same is not unreasonable and injurious to her. The certificate of the officer shall state his conclusions, and shall be conclusive of the facts therein stated. But the same may be impeached for fraud as other judgments may be."

Said Nina A. Kilpatrick died 26 October, 1916, and this proceeding by her administrator is to obtain possession of the bonds, which is refused by the husband. The court held that the administrator was entitled to one-half, and both parties appealed.

Chapter 166, Laws 1913, as amended by chapter 37, sec. 2, provides that "If any married woman shall die intestate leaving one child and her husband, her personal estate shall be equally divided between the child and husband. If she leave more than one child and husband, the husband shall receive a child's part."

Under the Constitution of North Carolina, Art. X, sec. 6, "the real and personal property" of any wife in this State, whether acquired before or after marriage, "shall remain the sole and separate estate and property of such wife." The husband had no interest, therefore, of any kind whatever in her estate. He had no vested interest whatever in her realty, but merely the bare possibility of becoming a tenant by curtesy should she die without will. *Thompson v. Wiggins*, 109 N. C., 508; *Walker v. Long, ib.*, 510; *Jones v. Coffey, ib.*, 515. He had nothing to release, but merely the power to refuse his written assent to her conveyance of this property.

It is agreed in this case that the conveyance of the land by the wife with the husband's assent, and the conveyance back of the same by the mortgage to secure the purchase money for said land, the notes being made payable jointly to the husband and wife, was all done "on the same day and as a part of the same transaction." And further, it is agreed "said bonds were executed to Zeph Kilpatrick and wife, Nina A. Kilpatrick, by consent and agreement of all parties to the transaction."

There is no indication here, and no evidence, that she made him an unqualified gift of the whole of the notes, or even of one-half of them,

as in *Rea v. Rea,* 156 N. C., 532, but it was a contract between all three parties to the transaction, the husband giving only his written consent to the conveyance, the wife conveying her property with such written assent, the grantee making a mortgage back to secure the purchase money notes which were made payable to husband and wife.

In *Rea v. Rea,* 156 N. C., 532, it is said, citing and approving *Sydnor v. Boyd,* 119 N. C., 481, that "there the wife attempted to assign her life insurance policy to her husband so as to make it payable to him at her death, and guaranteed 'the validity and sufficiency of the foregoing assignment.' This was an executory contract which would have changed or diminished the *corpus* of her estate at her death, and she would have incurred liability upon her guarantee. The Court held that this was a contract and invalid because not made in compliance with the Code, 1835 (now Revisal, 2107)." Such would be the effect of the contract in this case, and it is to prevent "changing or diminishing the *corpus* of her estate at her death" that this action is brought to recover these notes.

This transaction comes within the express letter as well as the spirit of Revisal, 2107, which makes void any contract between husband and wife "to affect or charge any part of the real estate of the wife . . . or to impair the body of the capital of the personal estate of the wife . . . unless such contract shall be in writing, and be duly proved as is required for conveyances of land, and upon examination of the wife separate and apart from the husband . . . it shall appear to the satisfaction of the officer," not only that the wife freely executed such contract, but "that the same was not unreasonable and injurious to her." And further the statute requires that "the certificate of the officer shall state his conclusion and shall be conclusive of the facts therein stated, subject to impeachment for fraud."

It is very clear that the transaction herein is void under this statute, and though the bonds were made payable to husband and wife, jointly, they remained her property as fully and completely as the land for which consideration alone they were given. The statute would be a useless formality if such transaction as this is valid, even if consideration by the husband was shown beyond giving the written assent to the conveyance, for it was not adjudged reasonable by the officer.

The identical point is decided in *Speas v. Woodhouse,* 162 N. C., 69, where *Hoke, J.,* cites with approval from *Brown, J.,* in *Sprinkle v. Spainhour,* 149 N. C., 223, as follows: "It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife that the spouse be jointly entitled as well as jointly named in the deed. Hence if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the

whole by survivorship. And it matters not if the conveyance is so made at her request because, being a married woman, she is presumed to have acted under the coercion of her husband" (citing authorities).

It was stated on the argument, though it did not appear in the facts agreed, that Nina A. Kilpatrick left children surviving her. It does not appear whether she left creditors or not, though under the Martin Act (Laws 1911, ch. 109) a married woman is authorized to contract and incur liabilities as fully as if unmarried. But both these facts are immaterial, for upon the death of a married woman her executor, or administrator, is entitled to the custody of her personalty as fully as if she were single or a man, and the personal representative is to account for the same in the same manner—first, in disbursement of the expenses of administration and payment of debts, if any, and payment of the surplus, if any, to the distributees designated by law. Such interest as the husband can show will be paid over to him in settlement of the estate.

Our conclusion is, that the administrator is entitled to recover possession of these notes from the husband, to be used in the due administration of the wife's estate.

The briefs of counsel on both sides admit that there is no decision in this State upon the question whether there is an estate by entireties in personalty. The decisions in other States on the point are conflicting.

In England the estate by entireties obtained only in realty and has been abolished even as to that.

In the defendant' appeal, no error.

In the plaintiff's appeal, reversed.

LILLIE W. DAVIS, ADMX., v. SOUTHERN RAILWAY COMPANY.

(Filed 9 October, 1918.)

Appeal and Error— Supreme Court— Opinion Certified— Courts— Jurisdiction—Petition to Rehear.

After a decision of the Supreme Court has been certified down, the Court is without jurisdiction to entertain a motion to recall the mandate and judgment rendered and reconsider it; the only method for such being upon petition to rehear, filed according to the rules.

BROWN, J. Motion made in this cause by defendant, appellant, to recall the mandate and judgment rendered at last term, and to award a new trial only upon the issues of negligence, contributory negligence, and damages.

The case is reported and issues set out in 175 N. C., 650.

There is no doubt as to the power of this Court to confine a new trial to such issues as the Court deems necessary to a proper determination of the issues raised by the pleadings.

There are a number of cases in our Reports where partial new trials have been granted.

It is now too late to entertain the defendant's motion. The case has passed from our jurisdiction and is now pending in the Superior Court of Buncombe County.

The only method by which the case could have been brought again within our control is by petition to rehear, which must be filed within forty days after the opinion has been handed down.

Motion denied.

L. SOUTHERLAND, JR., v. D. E. BROWN.

(Filed 9 October, 1918.)

1. Judgments—Contracts—Breach—Measure of Damages—Lumber.

In an action, with claim and delivery, for breach of contract and for possession of property, alleging that defendant was to receive $6 per thousand feet for lumber cut and "racked up" on the yard, with an additional $2 per thousand for hauling and loading it for shipment, the defendant alleging that the $6 were allowed as partial payments by installments, the verdict of the jury, upon the evidence, and under proper instructions, finding for the plaintiff, both as to the right of possession and the terms of the contract, entitles the defendant to receive only the $6 per thousand feet for cutting and "racking up" the lumber on the yard, and a judgment allowing him $8 per thousand feet therefor includes payment for services for hauling and loading the lumber for shipment, which he has not rendered, and to which he is not entitled.

2. Appeal and Error—Records—Judgments—Admissions.

An admission stated in the judgment, appearing in the record of the case on appeal, is controlling.

3. Courts—Discretion—Motions—Appeal and Error—Objections and Exceptions.

Objection that a verdict is against the greater weight of the evidence should be made upon motion, addressed to the sound discretion of the trial judge, to set it aside.

4. Verdict—Findings.

The findings of the jury to the issues should be examined in connection with the pleadings, evidence, and the judge's charge, and in this case they are *Held* not to be conflicting, but sufficient to settle the rights of the parties.

5. Costs—Possessory Action—Counterclaim—Damages—Appeal and Error.

In an action, with claim and delivery, for the possession of personal property, a counterclaim for damages raises an independent issue, as if a separate action had been brought; and where each party has recovered, such recoveries are distinct, and it is error in plaintiff's favor for the trial judge to divide all costs between the parties, except those of the claim and delivery proceedings, this not being a case where two amounts of money are recovered and the clear balance ascertained by deducting one from the other, but where personal property is recovered in the one case and money in the other.

ACTION tried before *Calvert, J.*, and a jury, at March Term, 1918, of DUPLIN.

Plaintiff brought this action to obtain the possession of 117,570 feet of lumber which was manufactured by the defendant at his mill under contract with the plaintiff, who caused claim and delivery process to be issued, under which the 117,500 feet of lumber was seized and delivered by the sheriff to him, the defendant not having replevied the same. The defendant pleaded specially that the plaintiff was indebted to him under the lumber contract in the sum of $543.66. The real difference between the parties consists in the construction of their contract, and the point of controversy is whether the plaintiff should pay $8 or $6 per thousand feet for the lumber—not the 117,570 feet merely, but the 454,927 feet, the quantity that was cut. The plaintiff alleged that defendant had broken the contract, and for that reason he had seized the 117,570 feet of lumber on the defendant's mill yard.

The jury returned the following verdict:

1. Did the plaintiff and defendant enter into a contract with reference to the Newton timber, as alleged by the plaintiff, L. Southerland, Jr.? Answer: Yes.

2. If so, did the defendant, D. E. Brown, breach his contract, as alleged by the plaintiff? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover of the defendant by reason of such breach of contract? Answer: $150.

4. Did the plaintiff and defendant enter into a contract with reference to the Newton timber, as alleged by the defendant, D. E. Brown? Answer: No.

5. If so, did the plaintiff, L. Southerland, Jr., breach his contract, as alleged by the defendant? (No answer.)

6. What amount, if anything, does the plaintiff owe to the defendant on account of the tally keeper and discount on the note of $152.37? Answer: $1.55 on note.

7. Is the plaintiff the owner and entitled to the immediate possession of the lumber described in the complaint? Answer: Yes.

8. What was the fair market value of the said lumber at the time of

the seizure? Answer: $11 per thousand; 117,570 feet, value $1,293.27.

9. Did the plaintiff, L. Southerland, Jr., remove from the mill yard any lumber belonging to the defendant, as alleged in paragraph 10 of his answer, and, if so, what was its value? Answer: 1,500 feet, worth $16.50.

10. What amount of lumber did the defendant cut from the timber described in the Newton deed? Answer: 454,927 feet.

11. What amount of money has plaintiff paid to defendant on account of the cutting of said timber? Answer: $2,963.31.

Judgment upon the verdict, and both parties appealed.

Stevens & Beasley for plaintiff.
H. D. Williams and George R. Ward for defendant.

WALKER, J., after stating the case as above: The plaintiff assigns two errors: First, that the court allowed the defendant $8 instead of $6 per thousand feet for the lumber; and, second, that the court charged him with one-half of the costs, exclusive of the costs in the claim and delivery proceeding.

As to the charge for the lumber, we are of the opinion that defendant was entitled only to $6 per thousand feet. The contract provided that this amount should be paid, that is, $6 per thousand feet, when the lumber was manufactured and "racked up" on the yard, and that the remaining $2 per thousand feet should be paid for hauling and loading on cars at Teacheys, N. C., for shipment to Willard, N. C. This was the plaintiff's contention, the defendant's being that the $2 was to be paid promptly upon delivery of the lumber at the place appointed for the purpose. The jury have found that the contract was as alleged by the plaintiff, as they have answered the first issue "Yes" and the fourth issue "No."

The court allowed the defendant $8, which included the $2 per thousand feet for the lumber, which plaintiff says was erroneous, and this is his first exception, which should be sustained. If plaintiff was right as to the terms of the contract, it is evident that the $2 was allowed for the cost and expense of hauling and loading the lumber, and as the defendant did not perform this service he is not entitled to compensation for it. His failure to complete his part of the contract, among other things, by hauling and loading the lumber, was the reason for issuing the claim and delivery. But even according to defendant's own construction, if the $2 per thousand feet was merely a stipulation for that amount to be paid as an installment of the price at a specified time, or upon the happening of a specified event, and it was not intended as the exact amount to be paid for the hauling and loading on the cars, the event did not occur; for defendant never hauled or loaded all of the lumber, as he agreed to do.

If he was prevented from doing so, or from performing his part of the contract, by the act of defendant, he should have proved his damages, because he was at no expense for hauling and loading a part of the lumber, and could not recover anything for what he did not do. The jury have found, under the instructions of the court, supported by evidence, that the defendant committed a breach of the contract, and that plaintiff owned the lumber on the yard and was justified in taking it under the process of court. But in the judgment it is stated to have been admitted by the parties that the $2 additional was the price for hauling and loading the lumber, and this defendant did not do. The record controls, and this is settled. *Farmer v. Willard,* 75 N. C., 401; *Threadgill v. Commissioners,* 116 N. C., 616; *S. v. Carlton,* 107 N. C., 956, and cases cited.

We will consider plaintiff's second exception, as to costs, hereafter.

The defendant's exceptions as to the first three issues are not tenable. There was evidence for the consideration of the jury—not very strong, perhaps, but still enough for the jury—upon these issues. If the verdict was against the weight of the evidence, the remedy was by motion to the judge to set the verdict aside, which was a matter within his sound discretion, and not reviewable here. We do not see that there is any necessary conflict between the findings on the issues. They can be reconciled if examined in connection with the pleadings, the evidence, and the judge's charge, and are sufficient, as they stand, to settle the rights of the parties.

We do not think the claim of a lien on the lumber is pleaded so as to enable us to pass upon it, even if, under the facts, the defendant had such a lien, which we do not decide. This is not like the case of *Huntsman v. Lumber Co.,* 122 N. C., 583.

As to the costs. The court divided all costs, except those in the claim and delivery proceeding, between the parties. This he had no power to do, and, as defendant has excepted to it, we must reverse that part of the judgment. The plaintiff denied that he owed the defendant, as alleged in the latter's counterclaim, and defendant recovered upon this issue. It was an independent issue and was the same as if he had brought a separate action for the amount of his claim. This appears from the manner in which the case was tried and the judgments were rendered, one of which was given for the plaintiff in the claim and delivery, and the other for the defendant upon his counterclaim, the two being treated as separate and distinct causes of action. It is not like a claim for a money judgment and a counterclaim of the same kind, in which the smaller amount recovered will be deducted from the larger and judgment given for the difference to the party entitled to it. Here the plaintiff got a judgment for specific personal property, and the defendant a judgment for money. The later cannot be deducted from the former, as it is im-

possible, in the nature of things, to do so. Plaintiff will seize and take the property into his possession, while defendant will get his money by execution and levy upon any property of the plaintiff. The recoveries, therefore, are distinct.

The judgment will therefore be modified in two respects:

1. By striking out the allowance of the $2 per thousand feet of lumber and allowing the defendant only $6 in all per thousand feet of lumber.

2. By taxing all costs of the counterclaim against the plaintiff, or all costs, apart from those pertaining to the action for the property and the claim and delivery proceedings, in which the plaintiff recovered a judgment, and, as thus modified, the judgment will be affirmed.

Costs of this Court divided equally between the parties.

Modified.

ALMIRA NELSON v. ROBERT NELSON.

(Filed 9 October, 1918.)

1. Husband and Wife—Wife's Separate Estate.

A wife is entitled to her separate estate, and to receive the rents and profits therefrom, whether living with or apart from her husband.

2. Same—Betterment—Equity—Statutes.

Permanent improvements put by the husband upon the lands of his wife, knowing that the lands were her separate estate, and not by mistake in honest belief that they were his own, does not entitle him to recover for betterments, upon any principle, equitable or otherwise.

3. Husband and Wife — Wife's Separate Estate — Improvements — Gift — Equity—Liens.

Where the husband knowingly places permanent improvements on the separate real estate of his wife, they will be presumed, nothing else appearing, to have been a gift to the wife, and no equitable lien in his favor can be presumed. *Arrington v. Arrington*, 114 N. C., 119, cited and applied.

ACTION tried before *Calvert, J.*, at February Term, 1918, of LENOIR, upon motion for judgment upon the pleadings.

The court rendered judgment for plaintiff. Defendant appealed.

Dawson, Manning & Wallace, and Cowper, Whitaker & Hamme for plaintiff.

Rouse & Rouse for defendant.

BROWN, J. Plaintiff is the wife of defendant, living separate and apart from her husband, but not divorced. She sues to recover possession and control of her landed estate from the defendant, and to enjoin

him from receiving the rents and profits or in any way interfering with her exclusive control of it.

The defendant admits he and his wife have separated, and that the property described in the complaint is the separate estate of the plaintiff. He avers that they were married in 1875 and separated in 1916, and that during that period he made valuable improvements upon his wife's land, amounting to $5,000. He asks that the lands be subjected to said charge in his favor, and that he be allowed to remain in possession and continue in receipt of rents and profits until such sum is repaid.

It has been settled in this State that the wife, whether separated from her husband or living with him, is entitled to the management and control of her separate estate and to receive the rents and profits. *Manning v. Manning,* 79 N. C., 301. This decision has been cited and approved in a large number of cases cited in the annotations. Its authority cannot now be controverted.

Recognizing the controlling force of the precedents, the defendant sets up a claim for betterments and seeks to subject the land to such lien.

The defendant does not aver in his answer that such improvements were made in pursuance of a written contract, probated and approved, as required by section 2107 of the Revisal, but, we presume, bases his claim upon the statute relating to betterments, or upon the principles of equity.

It is quite certain that the defendant has no claim under the statute, for he had no reasonable ground to believe that he had a good title to the land. He did not put the improvements on his wife's land by mistake in the honest belief that he was improving his own land. He knew the land belonged to his wife, and that she acquired it before marriage.

Therefore, he has not the shadow of a right under the statute. *Pritchard v. Williams,* at this term.

Nor has the defendant any lien in equity. If A. pays the purchase money for land and has a deed made to B., a resulting trust arises in favor of A. But if B. is A.'s wife at the time, no such trust arises, for the law presumes that A. had the deed made to his wife for her benefit. *Arrington v. Arrington,* 114 N. C., 119.

The same presumption arises as to improvements placed on the wife's land by the husband. They are presumed to have been placed there as a gift to the wife. *Arrington v. Arrington, supra; Kearney v. Vann,* 154 N. C., 316.

Affirmed.

J. E. BEFARAH AND E. NASSIF, TRADING AS RALEIGH BARGAIN HOUSE, v. T. F. SPELL, I. V. SPELL AND J. C. TAYLOR.

(Filed 9 October, 1918.)

Partnership—"Assumed Name"—Statutes.

Where a partnership business is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, chapter 77, Laws 1913, forbidding the carrying on or transacting business under an "assumed name," etc., does not apply. *Jennette Bros. Co. v. Coppersmith, ante,* cited as controlling.

ACTION tried before *Calvert, J.,* and a jury, at February Term, 1918, of SAMPSON.

The action is to recover on notes—one chattel mortgage to secure same, given to N. J. Aboud for the purchase price of stock of goods sold to defendants, Spell and wife, on 28 March, 1917.

At the close of the testimony, on motion, there was judgment of nonsuit, and plaintiffs excepted and appealed.

Butler & Herring and Manning & Kitchin for plaintiffs.
Grady & Graham for defendants.

HOKE, J. It appeared in evidence that, in 1917, the firm of Aboud Bros. were doing a general merchandise business at Roseboro, N. C., the firm consisting of N. J. Aboud, the principal owner and manager, and a brother, Abdou Aboud, resident in the "old country," who had put in the business about $300; that about sixty days before the transaction in question, the brother, Abdou, sold out all his interest to N. J., and thereupon the latter sold the entire stock to defendants, Spell and wife, for $4,000, $500 being paid in cash and the balance evidenced by promissory notes, payable in different amounts and at stated periods, with a chattel mortgage on the stock to secure the same, and all made to N. J. Aboud, the then sole owner; that said N. J. Aboud, being indebted to the Raleigh Bargain House for a considerable amount, assigned said notes and mortgages to secure his indebtedness, with full power of foreclosure, etc.; that, later, a formal written transfer of the notes and mortgages and the property therein contained was made by N. J. Aboud to the Raleigh Bargain House and to J. E. Befarah, the recital being that he had purchased the same, and who appears as one of the plaintiffs.

There was also allegation, with evidence, to the effect that, after the registration of the mortgage to N. J. Aboud, defendants, Spell and wife, had executed a further mortgage on the stock to defendant J. C. Taylor, plaintiffs contending that the mortgage was for a fictitious debt, and

there was nothing due thereon and never had been. The evidence further tended to show that the style and title of the Raleigh Bargain House was "The Raleigh Bargain House, Nassif & Befarah, Proprietors, Jobbers and Retailers," and that the full title was on all the letterheads, etc., the plaintiffs, J. E. Befarah and F. Nassif, being the proprietors and owners, as stated.

It further appeared that neither this firm nor that of Aboud Bros. has filed a certificate with the clerk of the court under chapter 77, Laws 1913, forbidding the carrying on or transacting business under an assumed name.

In a case at the present term, *Jennette Bros. Co. v. Elisha Coppersmith and wife,* the Court held that where the style and title of a business containing the surname of the proprietors was such as to afford a reasonable and sufficient guide to a correct knowledge of the individuals composing the firm, the case did not come within the statute, this not being in any sense an "assumed name," within the meaning and purpose of the law.

On the record, we are of opinion that both of these firms, Aboud Bros., composed of N. J. Aboud, and the Raleigh Bargain House, the style and title being "The Raleigh Bargain House, Nassif & Befarah, Proprietors," and composed of plaintiffs, J. E. Befarah and F. Nassif, come within the principle of that decision, and that the order of nonsuit must be set aside.

Reversed.

SALLIE HILL v. MARTIN HILL.

(Filed 9 October, 1918.)

1. Reformation of Instruments — Equity — Mutual Mistake—Evidence—Estates—Deeds and Conveyances—Ratification.

In an action to correct a deed, for mutual mistake of the parties, from a conveyance in remainder to a fee-simple title in the first taker, the evidence tended to show that the grantors knew at the time of its execution that the instrument conveyed the estate to the plaintiff for life, with the remainder over; and that the plaintiff was informed a month after the registration of the deed that she took only for life thereunder, and acted in some instances in recognition of the rights of the remainderman, and so held the possession for many years: *Held*, the evidence was insufficient for reformation of the instrument; and the plaintiff, having taken under the deed, must be held to have affirmed it as it was written.

2. Deeds and Conveyances—Estoppel—Heirs at Law—Descent.

The acceptance of an heir at law from the others of a deed to all of their "right, title, and interest" in the lands does not estop him from claiming such interest as may have descended to himself as an heir at law.

HILL *v.* HILL.

APPEAL by both parties from *Calvert, J.,* at June Term, 1918, of LENOIR.

This is an action to correct a deed, the plaintiff alleging that it was the intent of the parties that it should convey to her a fee-simple estate.

The premises and *habendum* of the deed are as follows:

"That the said parties of the first part, for and in consideration of the conveyance to the said parties of the first part by said party of the second part, of all her interest in the personal property of the late Amos Stroud, Sr., deceased, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell, and convey to said party of the second part, during the term of her natural life, and at her death to her son, Martin Hill, and his heirs, in fee simple forever, all their right, title, and interest in a certain tract or parcel of land situate in Lenoir County, State of North Carolina, adjoining the lands of Daniel Stroud, William Stroud, Ira Deaver, and others, bounded as follows (description omitted).

"To have and to hold the aforesaid right, title, and interest in the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging to the said Sallie Hill during the term of her natural life, and at her death to her son, Martin Hill, and his heirs in fee simple forever."

The plaintiff is a daughter and heir of Amos Stroud, Sr., and the grantors in the deed are the other heirs.

There were eleven children of Amos Stroud, Sr.

At the conclusion of the evidence, his Honor held that there was no evidence of mistake, and the plaintiff excepted. He also held that the plaintiff was entitled to one-eleventh of the land as heir of Amos Stroud, Sr., and to a life estate in the whole under the deed. The defendant excepted to the ruling that the plaintiff was entitled to one-eleventh of the land.

Judgment was entered in accordance with these rulings, and both parties appealed.

Moore & Moore and Ware & Ward for plaintiff.
Cowper, Whitaker & Hamme for defendant.

ALLEN, J. The evidence for the plaintiff shows that Amos Stroud, Sr., made advancements in land and money to all of his children, except the plaintiff, prior to his death, and that the deed, which the plaintiff wishes to correct, was executed by his heirs, but there is no evidence that the deed is not as it was intended by the grantors and the grantees; and the plaintiff, examined in her own behalf, did not offer to testify to any mistake or that there was any previous agreement with her father or the

heirs with which the deed does not conform. On the contrary, the evidence of the witnesses for the plaintiff proves that there was no mistake in the execution of the deed.

David Stroud, a grantor, and a witness for the plaintiff, testified:

Q. "Now, Mr. Stroud, speaking for yourself alone, I will ask you if you didn't fully understand when you signed this paper yourself that you were joining in a deed to the plaintiff here for her life and to the defendant remainder in fee? A. Yes, sir."

Louis Stroud, another witness for plaintiff:

Q. "So you thoroughly understood when you signed this paper, you thoroughly understood that you were signing a deed to this plaintiff for her life and to this defendant in fee, and that is the way you signed it? A. Yes, sir; that is, the magistrate told me."

Mrs. Fannie Sparrow, a grantor:

"I can read and write a little. I read the paper and saw that it went to Martin Hill in fee simple. I read it down to there. I reckon that I saw that it went to his mother for life. I don't remember that part now, but the part I saw, it went to Martin Hill in fee simple. I understood that thoroughly when I signed it."

The plaintiff, Mrs. Hill:

"I never knew a thing about this deed they have set up here until after it was recorded.

"Sam Stroud brought this deed to me after it was recorded. Fannie Sparrow first called my attention to the fact that this land was given to Martin Hill after my death—Mrs. Sparrow, who has just been on the witness stand. I cannot read or write.

"My daughter, Mrs. Sparrow, told me what was in this deed. She told me it was given to me for life, and to my son, Martin Hill, after my death. That was just a little while after it was recorded—about a month after it was recorded. I understood that thoroughly, and I have been knowing that ever since.

"I believe Martin has paid me rent for four years. I never rented to him but a year at a time. I told him he could tend it and pay me $60.

"I held this deed five or six or seven years—along there; then I asked him to take care of it."

It also appears that the deed was executed on 15 December, 1902, and was registered on 31 December of the same year, and, although she knew a month after it was registered that it conveyed a life estate to herself and a remainder in fee to the defendant, according to her own evidence, instead of repudiating it, she rented her life estate to her son, joined in the execution of a mortgage of the land, joined in a conveyance of the timber on the land, and gave half the purchase price to the defendant,

retaining the other half, and now, in affirmance of the deed, brings this action to correct it.

We must therefore deal with the deed as it is; and the plaintiff, having accepted a life estate under it, must take it with its burdens.

"A person cannot claim under an instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes in his favor, and at the same time repudiate or contradict another which is counter or adverse to it. *Jacobs v. Miller,* 50 Michigan, 127; *Emmons v. Milwaukee,* 32 Wisconsin, 434; *Morrison v. Bowman,* 29 California, 337; *Thompson v. Thompson,* 19 Maine, 235; *Smith v. Smith,* 14 Gray (Mass.), 532; *The Water Witch,* 1 Black (U. S. Supreme Ct.), 494; *Cowell v. Colorado Springs,* 100 U. S., 55; *Scholey v. Rew,* 90 U. S., 331; *Tuite v. Stevens,* 98 Mass., 305; *Caufield v. Sullivan,* 85 N. Y., 153; *Sawnson v. Tarkington,* 7 Heiskell (Tenn.), 612; *Hart v. Johnson,* 6 Ohio, 87; *Botsford v. Murphy,* 47 Mich., 537; cited in note, 6 N. Y. Chan. Rep. (Lawy. Co-op. Ed.), 1029." 3 Eng. Ruling Cases, 328.

"A person cannot claim under an instrument without confirming it. He must found his claim on the whole, and cannot adopt that feature or operation which makes in his favor, and at the same time repudiate or contradict another which is counter or adverse to it." 10 R. C. L., 681.

"A party who accepts a deed poll is bound by its covenants and conditions, for if he claims the benefits of the deed he must also assume the burdens imposed by it. He cannot claim under it and against it. *Fort v. Allen,* 110 N. C., 183." *Drake v. Howell,* 133 N. C., 166.

It is also "a well settled rule in regard to an estoppel by deed that, even in the case of a strict estoppel as between the parties to the deed the estoppel is in its operation commensurate only with the interest or estate conveyed. *Staton v. Mullis,* 92 N. C., 623; *Fisher v. Mining Co.,* 94 N. C., 397." *Drake v. Howell, supra.*

See, also, *Weeks v. Wilkins,* 139 N. C., 217, and *Bryan v. Eason,* 147 N. C., 292.

What, then, are the burdens imposed by the deed, and what interest or estate is conveyed? Amos Stroud, Sr., had eleven children. The grantors in the deed represent ten of these children, and the plaintiff in this action is the eleventh child. The deed does not purport to convey the land, but the "right, title, and interest" of the grantors, which was ten-elevenths of the whole, and it is this interest that is conveyed to the plaintiff for life, with remainder in fee to the defendant, leaving in the plaintiff as one of the heirs of her father a one-eleventh interest, which the deed does not purport to convey and to which no burden attaches.

It follows that his Honor held correctly that the plaintiff was not entitled to have the issue as to mistake submitted to the jury, because of

the absence of evidence to support the allegation, and that the plaintiff was entitled to one-eleventh of the land as heir, and a life estate in the remaining ten-elevenths under the deed.

The costs of the appeal will be divided.

Affirmed on both appeals.

LOUIS J. PARKER ET AL. v. CHARLIE PARKER ET AL.

(Filed 9 October, 1918.)

1. **Pleadings — Admissions — Lands — Divisional Lines — Lappage—Adverse Possession—Title.**

Pleadings will be liberally construed; and where the plaintiff has alleged the line of his senior grant as the true one in dispute between his own lands and those of the defendant adjoining them, and the answer alleges there is no lappage of that line with the line given in his junior grant; and, further, that he owns the land on both sides of that line, he is not confined by his pleadings to the location of the line described in plaintiff's grant, but may show title, by adverse possession, to the *locus in quo* beyond.

2. **Costs—Partial Recovery—Dividing Line—Lands.**

Where the plaintiff has recovered a part of the lands claimed by him, in an action depending upon the establishment of the true line between his land and those of the defendant adjoining them, the latter is properly taxable with the costs. *Swain v. Clemmons*, 175 N. C., 240, cited and applied.

APPEAL by both parties from *Devin, J.*, at August Term, 1918, of ONSLOW.

This is a processioning proceeding, to establish a line between the plaintiffs and defendants.

The plaintiffs allege the ownership of a certain tract of land, described by metes and bounds, and embraced in the Enoch King grant, and that defendants claim land upon the western side of the King grant, lying over and lapping on the lands of the plaintiffs.

The defendants, among other things, say, in their answer:

"3. They claim and own land lying upon the western side of the Enoch King patent, and deny that there is any lappage whatever by the lands owned by these defendants on plaintiffs, for that he does not own any land covered by defendant's title, and these defendants further say that W. D. Parker owns a part of the Enoch King patent land, to wit, a one-twelfth undivided interest therein, and, except as herein admitted, said third paragraph is denied.

"4. That defendant, W. D. Parker, claims and owns land lying on

both the eastern and western side of the line set out therein and claimed by plaintiff, and said defendant further says that plaintiff has no such line and does not own the land therein claimed by him, and, except as herein admitted, said fourth paragraph is denied."

The land was surveyed and plat made, as follows:

(See plat on next page.)

The plaintiffs connect with and claim under the Enoch King grant. The parcel of land in dispute is that represented on the map from the point 1 along the line 1 to 7 to its intersection with the line B C; thence to C; thence to D, and thence to 1. And, later, O. J. Parker became a party to the action and connected himself with the Enoch King patent and claimed the land included from the intersection of the line 1 to 7 with B C to 7; thence to 9; thence to C; thence to the said beginning intersection, making the full parcel of land in dispute in this action as it was tried, that included, as appears from the map, from the point 1 to 7; thence to 9; thence to D; thence to 1.

The defendants claim under the J. D. Parker grant, . . . and there is no dispute that the defendants connect themselves under said grant.

Coming to the location of the Enoch King grant, there is no dispute in the calls and location from the point 1 on the map down the line, following it where it breaks and turns to the point marked "Stump, Wright Hunter's corner." The next call in the Enoch King grant is, "thence along his line N. 62 W. 118 poles to the head of Juniper." The defendants contended that the head of Juniper was at 7 on the map. The plaintiffs contended that the head of Juniper was at 9. The jury located that call at 9. The next calls, carrying the grant to its beginning point, are as follows: "thence along James' line N. 30 E. 104 poles to Amen's line; thence with it to the beginning."

Evidence was offered by both parties as to the location of the lines, and the defendants also offered evidence tending to prove that their deeds covered the land in dispute, and that they had held adversely for more than seven years.

The jury established the dividing line from 9 to 1.

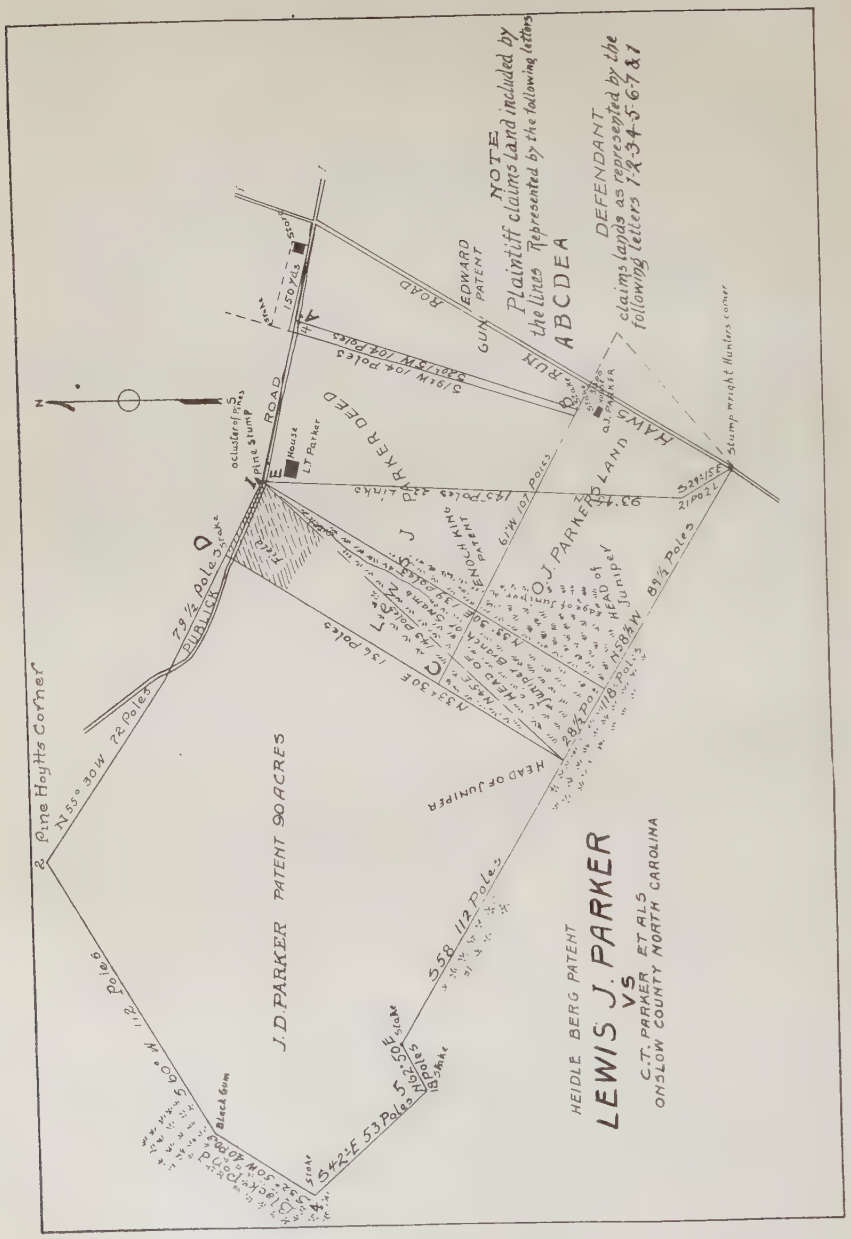
Judgment was entered accordingly, and taxing the defendants with the costs, and both parties appealed.

The plaintiffs state in their brief that "The questions presented by this appeal, for practical purposes, revolve around one proposition, to wit: Was it open to the defendants, under the pleadings in this cause, and especially the admissions and averments in the answers, to rely upon the seven-years statute of limitations?"

The defendants excepted to the judgment for costs.

Cowper, Whitaker & Hamme and Duffy & Day for plaintiffs.

Frank Thompson and McLean, Varser & McLean for defendants.


LEWIS J. PARKER
VS
C.T. PARKER ET ALS
ONSLOW COUNTY NORTH CAROLINA
HEIDLE BERG PATENT
J.D. PARKER PATENT 90 ACRES
NOTE
Plaintiff claims Land included by the lines Represented by the following letters
A B C D E A
DEFENDANT claims lands as represented by the following letters
1 2 3 4 5 6 7 & 1
EDWARD GUM PATENT
ROAD
HAWS RUN
J.D. PARKER
LAND
HEAD OF JUNIPER
HEAD OF JUNIPER
PUBLICK ROAD
Pine Stump
Stump Wright Hunters corner
Black Gum
Pine Hoyts Corner
N 55° 30 W 72 Poles
N 60° W 112 Poles
S 42° E 53 Poles
S 58 112 Poles
N 33° 30 E 136 Poles
S 33° E 145 Poles
N 33° 30 E 136 Poles
S 33° E 145 Poles
N 55° 30 W 104 Poles
S 34° W 104 Poles
79½ Poles
89½ Poles
N 55° 30 W 104 Poles
S 34° W 104 Poles
150 Links
Stone
House
L.T. Parker
Occasters
Pine Stump
Branch
Run
Spring
Head of Juniper
Stone
Stone
Stone

ALLEN, J. It is not contended that the defendants have not shown sufficient evidence to go to the jury to the effect that the J. D. Parker grant, being the junior grant, may lap over upon the Enoch King grant, so that the actual boundary called for in the Parker grant will take in the triangle from 9 to 1 to D and back to 9, or that the defendants have not offered evidence of possession for "seven years of that triangle." The plaintiff's contention is that, upon the pleadings, no such position was open to the defendants (plaintiff's brief), and this contention is upon the idea that—

1. Upon the pleadings, the location of the Enoch King grant is controlling—that is, the western line of said grant must be the eastern line of the Parker grant.

2. This being true, and it being admitted in the answer that there is no lappage, and that defendants own land on the west of the Enoch King grant, the question of seven years possession under color of title, on the theory that J. D. Parker's grant lapped on Enoch King's grant, the lappage being represented on the map by the triangle, D-1 9 and back to D, could not arise.

If we agreed with the plaintiffs as to their construction of the answer, we would perhaps reach the same conclusion, but we do not so understand the answer.

As we read it, the defendants deny that the location of the King grant, from 9 to D, as contended for by the plaintiffs, is the true line, and allege that the line runs from 7 to 1, and it is upon this position that they say there is no lappage; but they go further and say they own lands on both sides of the line from 9 to D.

In other words, giving the pleading a liberal construction, which is the established rule (*Brewer v. Wynne,* 154 N. C., 467), it first denies the location of the line as alleged by the plaintiffs, and therefore no lappage, and then alleges ownership of land on both sides of that line, which put the title in issue and permitted the introduction of evidence of adverse possession. *Whitaker v. Garren,* 167 N. C., 661.

The question of costs is decided against the defendants in *Swain v. Clemmons,* 175 N. C., 240, the plaintiffs having been adjudged to be the owners of a part of the land in controversy.

Affirmed on both appeals.

JAKE SUTTON v. CHARLES F. DUNN.

(Filed 9 October, 1918.)

1. Deeds and Conveyances — Cancellation of Instruments — Fraud — Evidence—Tax Deeds.

Evidence tending to show that the defendant bought plaintiff's land at a tax sale, for the amount of taxes due, while the latter was confined at home with sickness, and, before the time for redemption had passed, received from him a payment thereon, with assurances that he would protect the plaintiff's interest, and, with continued assurances, received several payments upon the taxes due, until he had greatly overpaid himself; that he had obtained the tax deed, and imposed upon the defendant by giving him, an illiterate man, receipts as for rent, are reasonable and permissible inferences of the defendant's design to wrongfully secure the land at a nominal sum, and sufficient to be submitted to the jury in a suit to cancel the tax deed for fraud in its procurement.

2. Judgments—Justices' Courts—Appeal—Estoppel.

Judgment in proceedings in summary ejectment, brought before a justice of the peace, wherein the plaintiff has set up a tax deed to the defendant's land to show title in himself, will not operate as an estoppel against the defendant's right to maintain a suit in the Superior Court to remove the tax deed as a cloud upon his title, when the proceedings in ejectment are still pending in the Superior Court on appeal, the trial in the latter court being *de novo* and the justice's judgment not a final one.

APPEAL by defendant from *Calvert, J.*, at February Term, 1918, of LENOIR.

This is an action to cancel a tax deed upon the ground that the defendant obtained it by fraud and misrepresentations.

The evidence tended to prove that the plaintiff owned a lot of land in the city of Kinston, on which is situated a dwelling-house, in which the plaintiff has been residing for about twelve years. The value of the property is about $1,000. In January, February, March, April, and May of the year 1915 the plaintiff was sick with pneumonia and was confined to his home practically all of the months mentioned. At the regular sale by the city of Kinston of real estate for the nonpayment of taxes for the year 1914, on 4 May, 1915, the *locus in quo* was sold by the city tax collector, and was purchased by one J. G. Banton, to whom a certificate was issued, and then transferred to the defendant herein. The property was sold for $12.10, which was sufficient to cover the taxes due the city.

As soon as the plaintiff sufficiently regained strength from his sickness he went to the defendant to repay the taxes and redeem the certificate issued to said Banton and then held by the defendant, and paid the defendant $4 upon said taxes. This was prior to the first Monday in May, 1916. Thereafter the plaintiff was again confined to his home by reason

of continued illness, and on the first Monday in May, 1916, which was the first day when a tax deed was obtainable under the sale for taxes for the year 1914, the defendant obtained the tax deed mentioned. The notice served upon the plaintiff in order to obtain the tax deed was served prior to the day in April on which the plaintiff went to the defendant and paid $4 on his taxes, and the defendant then assured the plaintiff that the matter was all right and that he would see that no harm came to him by reason of the existing condition.

Thereafter the defendant obtained the deed mentioned, dated 4 May, 1916, and, as the plaintiff would continue to make payments to him upon the taxes, as shown by the plaintiff's evidence, the defendant would issue receipts for each payment, and marked thereon "Rents" in lieu of taxes, though the first receipt had been issued for taxes. For some months the plaintiff continued to make payments, which were each time received by the defendant with assurances to the plaintiff that the matter was all right for him and he need have no fears, as he would carefully protect him. When the first payment of $4 was made and a receipt for taxes issued, the plaintiff's evidence tends to show that there was an agreement then made between the plaintiff and the defendant that the plaintiff would make payments in this way and that they would be accepted in the redemption of the tax certificate, all of which was prior to the execution of the deed, and that, notwithstanding the deed was later obtained without further knowledge to the plaintiff, and he continued to make payments, as he thought, upon his taxes, he was defrauded by the defendant obtaining the tax deed in the manner mentioned, and continuing to take payments and marking his receipts in payment for rent.

The plaintiff is an ignorant negro, unable to read and write, and unused to business transactions. The defendant, also a negro, has some education. The plaintiff relied upon the defendant to protect him.

The plaintiff continued to make payments, until finally he sought assistance from his employer in an effort to ascertain how much he had paid, being himself unable to make the necessary additions. It was then learned that he had paid $26.50 upon an indebtedness which the defendant himself contended to be only $17.05. He at once discontinued payments, and the defendant instituted a summary proceeding in ejectment before a magistrate to obtain possession of the property, and based the suit upon his tax deed and the receipts issued for rent. A judgment was rendered by the magistrate in favor of the plaintiff in that action (the defendant here), and an appeal taken to the Superior Court, where the action is still pending. The plaintiff in this action then instituted this action to cancel the deed as a cloud upon his title. The defendant offered evidence contradicting the evidence of the plaintiff. The issue

of fraud was submitted to and answered by the jury in favor of the plaintiff.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted.

The defendant offered in evidence the proceedings before the justice of the peace in summary ejectment, to show that the plaintiff could not attack his title. This was excluded, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Dawson, Manning & Wallace for plaintiff.
Charles F. Dunn for defendant.

ALLEN, J. It was admitted by the defendant that the tax receipt he held was for $12.10, with $1.05 costs, and that the plaintiff had paid him $26.50, for which he gave the plaintiff a receipt for $4 on taxes, and receipts for $22.50 purporting to be for rents.

The plaintiff testified that all of his payments were on the taxes and were accepted as such by the defendant; that he went to the defendant before the tax deed was executed, and when he had the right to redeem, and told him he wished to pay the taxes, but could not pay all at one time, and the defendant told him he would take it any way he could pay it; that he continued making his payments on the taxes, and that the defendant, in violation of his agreement, procured the execution of the tax deed.

It is a permissible and reasonable inference from this evidence that the defendant had conceived the plan of securing for himself for twelve or thirteen dollars the lot of the plaintiff, and that in order to carry his plan into execution and prevent a redemption until the time had passed, he told the plaintiff he would take the taxes any way he could pay them, and that to cover up his conduct and further strengthen his claim, he continued to accept payments after he received his deed, and gave the plaintiff, who could not read, fraudulent receipts, showing on their face they were for rent; and this is, in our opinion, sufficient to justify submitting the question of fraud to the jury.

The proceeding in summary ejectment before the justice was not competent as an estoppel upon the plaintiff, for which purpose it was offered, because, as stated in the answer of the defendant, it is still pending in the Superior Court on appeal, where it will be tried *de novo,* and none of the rights of the parties have been finally determined.

We find no error in the trial.

No error.

A. W. WILSON AND A. S. MEADOWS v. BOOKER L. JONES AND WIFE, LEAH.

(Filed 16 October, 1918.)

1. Trusts and Trustees—Parol Trusts—Mortgages—Sales—Purchasers.

A parol agreement with the purchaser at or before the sale of land under mortgage that he will hold the title subject to repayment by the mortgagor creates a valid and enforcible parol trust in favor of the latter.

2. Same—Assignment of Bid—Options.

Where the purchaser at a mortgage sale has agreed by parol with the mortgagor that he will hold the title subject to repayment by the latter, but, being unable to pay the purchase price, has assigned his bid to a third person, procured by the mortgagor, who acquires a deed for the land without knowledge or notice of the parol trust, but afterwards agrees with the mortgagor and purchaser at the sale that, should the mortgagor pay a certain sum at a fixed time, and the balance as specified, he would convey the title to him: *Held*, such an agreement is an option, conferring no interest in the property itself until compliance, and the purchaser is entitled to the possession as against the mortgagor therein, who has failed to comply with the terms of the option.

3. Trusts and Trustees — Parol Trusts — Trials — Appeal and Error—Mortgages—Sales—Surplus—Pleadings.

Where the plaintiff, a mortgagor, has failed in his suit to engraft a parol trust in his favor on the title acquired by the purchaser at the mortgage sale, and the cause has been tried solely on issues relevant thereto, the question of a recovery of the balance of the purchase price over and above the mortgage debt and costs of sale, though alleged in the answer, does not arise for determination on appeal. In this case the question is left, without prejudice, to be determined in an independent action, should it become necessary, and the mortgagor should thus proceed.

ACTION to recover land, tried before *Stacy, J.*, and a jury, at February Term, 1918, of FRANKLIN.

There was denial of plaintiff's title on the part of Booker Jones, and averment by way of further defense that plaintiffs held the land affected with a trust in favor of Booker Jones, growing out of an agreement with one J. W. King, who bid on the land at foreclosure sale, and which plaintiffs had recognized and were bound by.

Defendant Leah Jones answered, denying plaintiff's title, alleging the existence of a trust in favor of her husband, Booker, and also claiming a portion of the purchase money by reason of the fact that she held the legal title to the land, subject to a mortgage executed by herself and husband to secure the purchase money.

On issues submitted, the jury rendered the following verdict:

1. Do the plaintiffs hold the land described in the pleadings in trust for the defendants, as alleged in the answer? Answer: No.

2. Are the plaintiffs the owners in fee and entitled to the immediate possession of the land described in the complaitn? Answer: Yes.

3. Do the defendants wrongfully withhold the possession thereof? Answer: Yes.

4. What is the annual rental value of said land? Answer: $140.

Judgment for plaintiffs, and defendants, having duly excepted, appealed.

W. H. Yarborough and Ben T. Holden for plaintiffs.
W. M. Person and S. A. Newell for defendants.

HOKE, J. There were facts in evidence to the effect that in March, 1913, defendant Booker Jones bought the land in question at public sale under judicial decree and had the title conveyed to his wife and codefendant Leah; that he borrowed the money to pay for the land, the debt and accrued interest amounting to $1,320, and he and his wife joined in the execution of a deed of trust to secure the same; that default having been made, the land was, after due advertisement, sold under the provision contained in the deed and bid off by one J. W. King at $1,725; that King, not being able to secure the money, transferred his bid, with assent and procurement of said Jones, to the present plaintiffs. Deed was executed not long after the sale to present plaintiffs, who paid the price bid at the foreclosure sale, and in 1916 instituted the present suit.

The evidence on the part of the defendants tended to show that said King bid off the land and the bid was transferred to the present plaintiffs and title acquired under an agreement to hold the land in trust for said Booker Jones, and allow him to redeem the same at a stated price, and, on the part of plaintiffs, that there was no agreement to buy the land and hold in trust for Jones, but that the land was bid off by King for his own benefit; bid was transferred, money paid and title taken, and that afterwards and as an independent agreement, King and plaintiffs had given Jones an option on the land at the price bid, he to pay $200 at the end of the first year, and on such payment he was to have another year within which to buy the land, etc.; that plaintiffs had bought the land and taken the title without notice of an agreement between King and Jones, but that in recognition of King's agreement plaintiffs had given defendant a written option to the effect, as stated, that said defendant had never made any payment pursuant to the option nor any payment whatever on the land under either agreement, and having failed and refused to pay plaintiff, brought suit for possession of the property.

On these opposing positions, it is fully recognized in this jurisdiction that if, at or before the sale, there was an agreement between these

parties creating a trust in favor of the defendants, the same could be made available to them in the present action. *Williams v. Hunnicutt,* at the present term; *Gaylord v. Gaylord,* 150 N. C., 222; *Sykes v. Boone,* 132 N. C., 199.

In *Gaylord case, supra,* the principle is stated as follows: "The seventh section of the English statute of frauds, forbidding 'the creation of parol trusts or confidences of lands, tenements or hereditaments, unless manifested and proved by some writing,' not being in force with us, and no statute of equivalent import having been enacted, these parol trusts have a recognized place in our jurisprudence and have been sanctioned and upheld in numerous and well-considered decisions," citing *Avery v. Stewart,* 136 N. C., 436; *Sykes v. Boone,* 132 N. C., 199; *Shelton v. Shelton,* 58 N. C., 292; *Strong v. Glasgow,* 6 N. C., 289.

And in *Sykes v. Boone* it was held, among other things, "That when a person takes a deed for property with an agreement that he will, upon the payment of a certain sum, convey the same to a third person a parol trust is created in favor of the latter."

On the other hand, if, as plaintiffs contend, this land was purchased and title acquired without such agreement existent at the time, and afterwards the purchaser gave to the original owners the privilege or option to buy on compliance with specified terms, and no compliance whatever made by such owners within the time, in that event defendants, the original owners, never acquired or held any interest in the property itself, and their claim is no valid defense in a suit by the purchaser for the possession of the property.

Interpreting and allowing significance to the verdict in reference to the testimony and his Honor's charge, the permissible and proper rule under our procedure (*Reynolds v. Express Co.,* 172 N. C., 487), it is clearly established that the transaction between these parties created not a trust but an option; that there had been no compliance with the terms made or attempted by defendants, or either of them, and we are of opinion that the judgment on the verdict, that plaintiffs are the owners and entitled to possession of the property, must be affirmed.

We are not inadvertent to the fact that Leah Jones, the original holder of the naked legal title, has filed an answer claiming the surplus realized at the foreclosure sale over and above the amount borrowed for the purchase money, or that J. W. King, who has apparently received his, also had been made party defendant. On the facts in evidence, such a claim is not necessary or properly relevant to the determinative issues involved in this action. It does not appear to have been considered or passed upon in the court below, nor are there any exceptions noted that present it for decision on the present appeal. The judgment, however, will be entered without prejudice to any claim she may have for such

surplus asserted in an independent action for the same. *Baugert v. Blades,* 117 N. C., 221.

There is no error, and the judgment below is affirmed.

No error.

ELWOOD H. LEE v. F. J. THORNTON ET ALS. (Consolidated cases.)

(Filed 16 October, 1918.)

1. **Actions—Possession—Courts—Jurisdiction.**

   The writ of possession is not limited to actions of foreclosure of mortgages, but extends to all actions brought for the purpose of determining the rights of the litigants to the title or possession of real estate after judgment declaring such rights.

2. **Same—Writs—Assistance—Mortgages—Sales.**

   One either in possession or out of possession of lands may maintain a suit to set aside a deed thereto for fraud and undue influence, and in the same action recover possession of the lands and the rents and profits, and upon decree rendered in his favor may apply to the court, by supplemental petition, for such writ as will render the decree effective, usually a writ of assistance, and it is unnecessary to bring a second action therefor.

3. **Actions—Consolidation—Deeds and Conveyances—Fraud—Writs—Assistance—Courts—Jurisdiction—Equity.**

   Where a suit to set aside a deed for fraud and an accounting for rents, etc., and subsequently an action to obtain possession have been instituted, it is proper for the court to consolidate them, the rights of the parties being determinable in the first action under our system of administering equity and law in the same court.

4. **References—Compulsory—Consent—Pleas in Bar—Accounting—Statutes.**

   A compulsory reference may not be ordered by the court except in the instances enumerated in Revisal, sec. 519, and in no event when there is a plea in bar undetermined; and where a suit to set aside a deed to lands for fraud with accounting for the rental of a small tract of land for a few years, and an action for possession, and a petition for dower, have been consolidated, an allegation of the wife's adultery interposed is one in bar of the wife's right, Revisal, sec. 3083; and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference of each action and proceeding under one form it is improvidently entered, and will be set aside. The difference between a compulsory and a consent reference distinguished by ALLEN, J.

APPEAL by plaintiff Elwood H. Lee from *Ferguson, J.,* at the April Term, 1918, of WAKE.

This is an appeal from an order made in two actions and in a special proceeding pending in the Superior Court of Wake County.

The first action was commenced on 16 January, 1914, by Elwood H. Lee, as heir of James Lee, for the purpose of setting aside certain deeds executed by said James Lee to the defendants on the ground that James Lee did not have sufficient mind to execute a deed, and that the deeds were procured by fraud and undue influence.

The second action was commenced on 23 April, 1915, by the said Elwood Lee against the defendants Mason and wife for the purpose of recovering possession of the land described in the complaint in the first action, the said defendants having entered into possession of said land since the institution of the first action.

The first action was tried at January Term, 1917, of the Superior Court, and a jury having found all the issues in favor of the plaintiff a judgment was entered thereon declaring the deeds void and setting them aside because they were procured by fraud and undue influence.

On 5 December, 1917, the widow of James Lee filed her petition against the said Elwood H. Lee, asking that dower be allotted to her in said land, and the said defendant filed an answer to said petition setting up as a defense that the said widow had committed adultery in the lifetime of the said James Lee and was not living with him at his death.

At the April Term, 1918, of said court an order was entered over the objection of the said Elwood Lee entitled as of each of the three proceedings hereinbefore referred to, and referring all matters in controversy in all of said proceedings to one referee to be heard at the same time. The said Elwood Lee excepted to said order and appealed.

S. W. Eason and Peele & Maynard for appellant.
Douglass & Douglass for appellee.

ALLEN, J. One who is not in possession of land may bring an action to set aside a deed for fraud and undue influence and in the same action recover possession of the land and the rents and profits, as was done in *Reed v. Exum,* 84 N. C., 430, or, whether in possession or not, he may prosecute his action to set aside the deed and, upon a decree being rendered in his favor, apply to the court by supplemental petition for such writ as will render the decree effective, usually a writ of assistance, which was the course pursued in *Root v. Woolworth,* 150 U. S., 401.

"The power to issue the writ results from the principle that the jurisdiction of the court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties, and the court will carry its decrees into full execution, where it can do so justly, without relying on the cooperation of any other tribunal. This is a rule of such practical utility in promoting the ends of justice, preventing unnecessary suits, saving expense, and avoiding delay, as commends itself strongly to the approbation of the courts of equity." 2 R. C. L., 728.

"It has been said that the most familiar instance of its use is where land has been sold under a decree foreclosing a mortgage. *Harding v. Harker,* 17 Idaho, 341; *Jones v. Hooper,* 50 Miss., 513. The writ is not limited, however, to cases of the foreclosure of mortgages, but extends to all actions brought for the purpose of determining the rights of the litigants to the title or possession of real estate after judgment declaring such rights. *Schenk v. Conover,* 13 N. J. Eq., 223; 78 Am. Dec., 95; *Knight v. Houghtalling,* 94 N. C., 408; *Stanley v. Sullivan,* 71 Wis., 585. See, also, *Yates v. Hambly,* 2 Atk. (Eng.), 362; *Adamson v. Adamson,* 12 Ont. Pr., 21." Ann. Cases, 1913 D, 1121.

The same principle is declared in *Clarke v. Aldridge,* 162 N. C., 328, and we have found nothing to the contrary except *Clay v. Hammond,* 199 Ill., 370, which limits the exercise of the jurisdiction to those decrees which pass the title, and of this last case the learned annotator says, in 93 A. S. R., 156, after expressing his disapproval of the doctrine announced, "We see no occasion to recede from our views heretofore expressed in section 37d of Freeman on Executions, in speaking of writs of assistance, as follows: 'As to the decrees or orders which may justify the issuing of this writ, it may be stated broadly that whenever there has been an adjudication in equity from which it appears that a party is entitled to be in possession of property, the court will not require him to bring some further or independent suit or action, but will grant him this writ, entitling him to be placed in possession of the property. This is but an application of the general principle that when a court of chancery obtains jurisdiction of the subject-matter of a suit it will retain it to the end that justice may be done between the parties.' "

It follows, therefore, the second action was unnecessary as the plaintiff could have been put in possession in the first, and, under our system, which administers law and equity in one action, he could also have had the amount of the rents and profits ascertained; but as no objection has been made on this ground, and the right to possession has been denied, these two actions ought to be consolidated and heard together, to the end that a writ issue putting the plaintiff in possession of the land and turning the defendants out, and that the rents and profits be determined, which are the only questions unsettled in those actions.

In the proceeding for the allotment of dower the defendant sets up as a defense that the petitioner committed adultery in the lifetime of her husband and was not living with him at his death, which, under Revisal, sec. 3083, may be pleaded in bar of any proceeding for dower.

It appears, therefore, that whether the order is treated as one of consolidation and a reference of the consolidated action, or as a reference of each action and proceeding under one form, in either event a compulsory reference has been ordered, when the only question open in the

two actions is the amount of the rents, and when in the dower proceeding there is a plea in bar undetermined.

Did the court have the power to order a reference under these conditions? We think not. The right to refer by consent is without limit, subject to the exceptions mentioned, which are not material here, the statute providing that "All, or any of the issues in the action, whether of fact or of law, may be referred, upon the written consent of the parties, except in actions to annul a marriage or for divorce and separation." Revisal, sec. 518. But the court cannot order a compulsory reference except in the cases enumerated in Revisal, sec. 519, nor can such an order be made when there is a plea in bar undetermined.

This distinction exists because in the compulsory reference the parties reserve their right to a jury trial upon the coming in of the report of the referee, and as the parties will be subjected to the expense and delay of two trials, it ought not to be resorted to for the trial of the issues raised by the pleadings, except when a long account, complicated boundary, or some other intricate questions arise which cannot be intelligently investigated before a jury (*Hall v. Craige,* 65 N. C., 53; *Peyton v. Shoe Co.,* 167 N. C., 282), nor when a plea in bar has not first been tried (*Oldham v. Reiger,* 145 N. C., 255), and in the actions before us there is one single simple question of the rental value of a small body of land for two or three years, and in the dower proceeding there is a plea in bar.

The order was improvidently entered and will be set aside.

Reversed.

IN RE JOHN CHISHOLM'S WILL.

(Filed 16 October, 1918.)

1. Judgments—Consent—Contracts.

A judgment entered with the consent of the parties is a contract between them in respect to the subject-matter.

2. Same—Date of Payment—Delayed Payment—Interest.

Where a consent judgment for a recovery of a certain sum is made a lien on lands, and by its terms payable ninety days from its rendition, it bears interest from the first day of the term, the time given being merely for the purpose of raising the money for its payment; and where the only question submitted to the court is whether interest is chargeable from the date it was payable to a further period beyond, interest for such extended period at the rate of 6 per cent should be allowed.

3. Judgments—Contracts—Interest—Caption—Statutes—Interpretation.

In Revisal, sec. 1954, the heading punctuated "Contracts, except penal bonds and judgments to bear" (interest), etc., should be read as if a comma had been placed between the word "bonds" and the words "and judgments."

IN RE CHISHOLM'S WILL.

APPEAL by propounders from *Calvert, J.*, at April Term, 1918, of HOKE.

In this proceeding a consent judgment was entered at August Term, 1917, of Hoke, providing, among other things, that the caveator, M. A. Chisholm, was indebted to the propounders, Mrs. Sallie Covington, Mrs. Maude Steele, and Zebbie Harris, in the sum of $6,000, to be paid within ninety days after the signing of the judgment. Payment was not made or tendered until three and one-third months after the said ninety days had expired. The propounders claim interest at 6 per cent on the $6,000 for said three and one-third months.

From the judgment that the propounders were not entitled to interest on the said $6,000 for the three and one-third months the propounders appealed.

J. W. Currie for propounders.
No counsel contra.

CLARK, C. J. The only exception is for error in disallowing the $100, interest for the three and one-third months elapsing after the expiration of the ninety days. The $6,000 was paid six and one-third months after judgment signed, without prejudice to either side as to the liability for the said interest.

A consent judgment is a contract between the parties thereto. *Bank v. Commissioners,* 119 N. C., 214; *Bunn v. Braswell,* 139 N. C., 135. The consent judgment specifies that the $6,000 should be a lien upon the land of the *caveator* which was pleaded as security for the indebtedness. The *caveator* not having paid at the specified date, we can find no reason that said sum should not bear interest during the delay to make payment after the stipulated date. Rev., 1954, in the chapter on "Interest," provides: "All sums of money due by contract of any kind whatsoever, excepting money due on penal bonds, shall bear interest; and when a jury shall render a verdict therefor, they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it be paid and satisfied." Said section further provides: "In like manner, the amount of any judgment, or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the court shall be rendered according to this section."

The learned judge was probably misled by the punctuation of the heading, which reads: *"Contracts, except penal bonds and judgments to bear; jury to distinguish principal from."* There should have been a comma after the word "bonds," as the text of the section plainly shows.

The meaning of the headline is, evidently, "Contracts (except penal bonds) and judgments to bear" interest.

Though the caption of a statute may be called in aid of construction, it cannot control the text when it is clear. *Blue v. McDuffie,* 44 N. C., 131; *Hines v. R. R.,* 95 N. C., 434; *Jones v. Ins. Co.,* 88 N. C., 500; *S. v. Woolard,* 119 N. C., 779. Especially is this true as to the headings of a section in the Code prepared by the compilers. *Cram v. Cram,* 116 N. C., 288.

If, as we understand the face of the consent judgment, the $6,000 was due at that date by reason of the arrangement and settlement as to the estate then made, the reasonable construction is, that said sum would bear interest from the first day of the term, as is the rule with judgments, and that the ninety days delay did not arrest the running of interest, but was merely time given in which to raise the money. This is the natural and legal effect of such order. Just as when there is a decree of foreclosure and ninety days given, there is no cessation of the interest, which continues to run. But in this case, by consent, the only question submitted to the Court is whether or not the *cavcator* is liable for the $100 interest accruing on the $6,000 during the three and one-third months after the lapse of the ninety days. No demand is necessary as to contracts and judgments to set the interest running. The statute does that.

The propounders are entitled to recover said $100, with the interest thereon, and the costs.

Reversed.

EMILY L. GOOCH v. WELDON BANK AND TRUST COMPANY, ADMR. OF J. T. GOOCH.

(Filed 16 October, 1918.)

1. Principal and Agent—Limitation of Actions—Demand and Refusal.

The right of action of a principal against his general agent begins to run from his demand and refusal, or from the death of the agent.

2. Same—Husband and Wife—Wife's Separate Property.

Where the husband has acted as the general agent of his wife to invest and reinvest her separate property, or moneys belonging to her separate estate, according to his own judgment, and the husband has died, and there is no evidence of a demand on her part for the property or investments so made, or his refusal thereof, the agency ceased by operation of the law, at his death, and the statute of limitation will begin to run only from that time.

3. Same—Personalty—Jus Accresindi.

Where the husband, acting as the general agent of his wife, has invested her separate personalty in certain shares of stock, having had them issued

to himself and wife, the shares remain the separate property of the wife, and the question of the right of survivorship in personalty between husband and wife does not arise. This question discussed by CLARK, C. J.

HOKE and ALLEN, JJ., concur in result.

APPEAL by defendant from *Kerr, J.*, at March Term, 1918, of HALIFAX.

F. S. Spruill, W. L. Long, and George C. Green for plaintiff.

Garland Midyette, C. G. Peebles, W. E. Daniel, and Murray Allen for defendant.

CLARK, C. J. This is an action by the widow of James T. Gooch against the administrator of her deceased husband, alleging that, soon after his marriage, as general agent of his wife he took the absolute control, management, and administration of all her separate property; that he made sales of her separate real estate at frequent intervals, having the deeds properly executed by him and her, but collecting the purchase money and investing it according to his judgment; that in this manner, between 1903 and his death, in 1916, he made sale of fourteen parcels of his wife's separate real estate, in each case collecting the purchase price of same, using and investing it as her general agent; and that, in addition, he also collected a considerable sum of money that came to her as distributee of her father's estate, which he also held and administered in the same way, though of this latter fact proof could not be offered. Moreover, the plaintiff was the owner of a considerable quantity of stock in the Weldon Brick and Land Improvement Company, which her husband in the same manner from time to time transferred upon the books or delivered to the transferees without consulting or advising with his wife, some of which he sold outright for cash, which he used in like manner as the proceeds of her land, until the larger part of this stock was placed in his own name or in the joint name of himself and wife.

There was no settlement or demand for settlement. The husband died, leaving no will and no children of the marriage, and the defendant bank qualified as his administrator. The heirs at law and next of kin have been made parties defendant with the bank.

This action is to recover from the husband's estate said sums of money and the said shares of stock. The jury have found that defendant's intestate at the time of his death was indebted to the plaintiff in the items set out from 5 to 19 in the sum of $10,821.67 for the proceeds of the sale of her realty, and in the further sum of $800 for money which her husband received from the sale of certain shares of her stock in the brick company. The jury also find that she was the beneficial owner of fifteen shares of stock of the brick company which stood in

the name of her husband and the owner of five other shares of stock of the same nature. While there are forty-four exceptions taken as to all the above, there is practically but one exception thereto, and that is the ruling of the judge that the plaintiff's claim was not barred by the statute of limitations.

In this there was no error. The statute of limitations does not run against an agent until demand and refusal. *Moore v. Hyman,* 34 N. C., 38; *Wiley v. Logan,* 95 N. C., 358; *Buchanan v. Parker,* 27 N. C., 597.

In *Patterson v. Lilly,* 90 N. C., 89, it is said: "In *Commissioners v. Lash,* 89 N. C., 159, it was held that where the relation of principal and agency subsists, the demand for an account necessary to put the statute of limitations in operation must be such as to put an end to the agency. *Nothing less than a demand and refusal,* or the coming to a final account and settlement, or the death of one of the parties, will put an end to the agency." There was no evidence here tending to show a demand and refusal or any other termination of the agency, except the death of the husband, and the court properly instructed the jury that the statute of limitations did not bar. The subject is fully discussed by *Smith, C. J.,* in *Commissioners v. Lash,* 89 N. C., 168, and by *Pearson, J.,* in *Blount v. Robeson,* 56 N. C., 102.

This affirms the recovery for $11,621.67, with interest at 6 per cent from 21 April, 1916, the date of the death of said J. T. Gooch, and the termination of his general agency for the plaintiff. The rest of the recovery was adjudging the plaintiff the owner and entitled to the sole possession and enjoyment in her own right of fifty-five shares of stock of the par value of $50 each in the Weldon Brick and Land Improvement Company. Twenty of these shares stood in the name of J. T. Gooch alone, and the jury find that they were bought with the funds of the plaintiff, and there can be no question as to them. Indeed the only exception is on the same ground of the statute of limitations. The other thirty-five shares stood on the books in the joint names of E. L. Gooch (plaintiff) and J. T. Gooch.

By the uncontradicted evidence, these shares, like the other twenty, were bought by him by using funds in his hands belonging to his wife, or rather he transferred these shares belonging to her to another party, who transferred them back to E. L. and J. T. Gooch. These shares, therefore, also remained her sole property. *Kilpatrick v. Kilpatrick,* at this term; *Speas v. Woodhouse,* 162 N. C., 68.

The judge instructed the jury to answer the issue as to the thirty-five shares "Yes," giving no reason, and wrote the answer himself. In this there was no error. The exception (33) taken assigns no ground therefor.

It is true that in the complaint it is alleged, as a matter of abundant

caution, that the plaintiff was entitled to these shares anyway by entireties, and if this were not so, that she was entitled to one-half thereof as tenant in common. The defendant also endeavored to raise the legal proposition whether there was an estate by entireties in personalty by asking the judge to charge that there was not. The court did not charge at all on the proposition, but merely directed a verdict for the plaintiff upon the evidence, according to which her ownership of these thirty-five shares had not been changed. *Kilpatrick v. Kilpatrick, supra.*

An estate by entireties is of purely judicial creation in England in the remote past, for there is no statute there or in this State recognizing it. *Gaston, J.,* 19 N. C., 537, says: "When *lands* are conveyed to husband and wife, they have not a joint estate, but they hold by entireties. Being in law but one person, they have each the whole estate as one person; and on the death of either of them, the whole estate continues in the survivor. This was settled at least as far back as the reign of Edward III, as appears from the case on the petition of John Hawkins, as the heir of John Ocle, quoted by *Lord Coke,* 1 Inst., 187a." This was quoted with approval by *Hoke, J.,* in *McKinnon v. Caulk,* 167 N. C., 412. The estate originated in feudal reasons, that when the wife died the land should go to the husband by survivorship; but there was no such reason as to the personal property of the wife, which became absolutely the property of the husband on marriage. There was no estate by entireties in personalty in England, and it has been abolished as to realty by the Married Woman's Act of 1882. *Thornley v. Thornley,* 2 Ch. Div. (1893), 229.

The estate is an exception to the general rule, that where there is a conveyance or devise to two, they should hold as tenants in common, and gave to the husband survivorship in the wife's realty, of which he had the income only and not the absolute property, as he had of her personalty.

In 1784 (chapter 204, sections 5 and 6, now Rev., 1578 and 1579) estates tail were converted into fee simples, and joint tenancies into tenancy in common. The Court, in this State, however, held that the latter did not apply to estates by the entirety, but in each case where this was held only realty was involved.

The Constitution of 1868, Art. X, sec. 6, revolutionized our policy as to the ownership of property by married women, and provided that all the property, real and personal, of a married woman, whether acquired before or after marriage, should remain her sole and separate property as fully as if she were unmarried. We have decisions since 1868 holding that this did not destroy the estate by entireties, but all these cases were as to realty.

In other States the decisions are in conflict whether the "Married Women's Property Acts" have destroyed the estate by entireties. The

courts of some States (and in England, whence we derive the doctrine) holding that they do, and others to the contrary, but even in those States, which hold that the estate by entireties was not destroyed, there are conflicting opinions whether there is any estate by entirety in personalty.

In this State we have had no decision holding that there is an estate by entirety in personalty, and there is no reason in this case, and at this late day, to extend it to personalty, for the point does not arise on the facts in this case, and the judge below made no ruling upon it.

The objection urged to the estate by entireties is not only that it is an anomaly in our judicial system, without any statute recognizing it, and that it is contrary to our policy as to property rights of women, as stated in the Constitution, but that it abstracts the property embraced in it from liability to debt during the joint lives, and that during all this time the husband enjoys the income from the wife's half of the property, as well as from his own half.

Whatever force may be given to these objections, the matter may well be left to the lawmaking department of the government. This Court has more than once suggested the abolition of the estate by entireties to the Legislature. *Bynum v. Wicker,* 141 N. C., 96; *Finch v. Cecil,* 170 N. C., 74, 75.

No error.

R. B. TAYLOR v. COMMISSIONERS OF MOSELEY CREEK DRAINAGE DISTRICT.

(Filed 16 October, 1918.)

1. Drainage Districts—Statutes—Assessments—Notice—Publication—Deeds and Conveyances—Warranty.

A motion in the cause, in proceedings for establishing a drainage district, by one who has conveyed lands therein, will be denied, when made on the ground that such person had not been personally served and has conveyed the land to another with warranty against liens or encumbrances, when it appears that the purchaser, in possession, had been personally served, and the grantor lived only a few miles from the district wherein the work was in progress, and the statutory notices had been published to bring in the landowners, with ample time given for objection, exception, or appeal, under the requirements of the statute, which had not been observed or followed.

2. Drainage District—Owner's Consent.

It is not necessary that every owner of land within a drainage district should have assented to its formation when the statutory number thereof have done so.

3. Drainage Districts—Assessments—Benefits—Findings by Clerk.

An owner of lands in a drainage district is liable for a proper assessment in accordance with the benefits accruing to his lands, and it is immaterial that, on appeal from the clerk, the judge has stricken out from his findings that the improvements exceeded the benefits conferred.

4. Drainage Districts—Proceedings in rem—Notice—Nunc pro tunc—Assessments.

The proceedings for forming a drainage district are *in rem;* and where a valid statute has been complied with therein, and it appears that an owner has not been served with process, it is admissible to notify him, in possession, *nunc pro tunc,* and have the lands therein assessed.

5. Drainage Districts—Accruing Assessments—Date of Liens.

Assessments upon lands in a drainage district formed under a statute become liens *in rem* from the time they are due and payable.

6. Drainage Districts — Assessments — Liens — Encumbrances — Deeds and Conveyances—Warranty.

Assessments upon lands in a drainage district are liens *in rem,* resting upon the lands, into whosesoever hands it may be at the time they accrue, and do not come within the terms of a warranty against encumbrances by deed.

7. Drainage Districts—Police Regulations—Health—Condemnation.

The drainage of swamps and of surface water from agricultural lands in a drainage district are declared by chapter 442, Laws 1909, to be for the public benefit and conducive to the public health, etc., thus falling within the police regulations; and proceedings thereunder are in the exercise of the right of eminent domain.

8. Drainage Districts—Notice—Assessments—Laches.

Where due notice by publication has been made, in the formation of a drainage district, and the report of the viewers has been confirmed by the clerk, without objection, exception, or appeal, the presumption is that an owner of land therein has not been found upon issuance of personal process; and the substituted service, nothing else appearing, is valid.

APPEAL by Florence K. Banks from *Allen, J.,* at chambers at New Bern, 14 February, 1918, heard by him on appeal from the clerk.

Dawson ,Manning & Wallace and Moore & Dunn for petitioners.
Rouse & Rouse and Y. T. Ormand for George Pate.
No counsel contra.

CLARK, C. J. This is a motion in the proceeding for the establishment of the "Moseley Creek Drainage District" in Craven. Said district lies partly in Craven and partly in Lenoir. The proceeding, however, for the establishment of the district was filed and the orders taken in Craven, as authorized. Laws 1909, ch. 442, sec. 2. The petitioner, Mrs. R. C. Banks, in 1915, instituted an independent action to restrain the

collection by the Sheriff of Craven of an assessment levied upon the lands of George B. Pate (which she had conveyed to him in August, 1913) to pay the bonds and interest issued for the construction of the "Moseley Creek Drainage District." On appeal (*Banks v. Lane,* 170 N. C., 14) this Court, in an unanimous opinion, held that the restraining order should be dissolved. The Court said:

"The defendant, George B. Pate, was in possession of the land under conveyance from the *feme* plaintiff, and was duly served with summons, and acquiesced in all the proceedings taken in said cause, or *at least is bound by them.* By virtue of the notice required by above acts, the *feme* plaintiff had opportunity to intervene and assert any right she might have to oppose the proceeding, if deemed contrary to her interests. Laws 1911, ch. 67, sec. 1. Not having done so, she is bound by the judgment under which the bonds were issued for this improvement." . . . "Even if the owner in possession of this land, George B. Pate, had opposed the final decree, or, indeed, opposed the formation of this drainage district, his land therein is chargeable with payment of the assessment thereon, and his mortgagee, the *feme plaintiff,* is in no stronger condition and cannot stay the collection." . . . "In this case the district has been regularly established. There is an adjudication that the required notices have been given. The bonds have been issued and the bondholders have a right to have the assessments collected to pay the interest and principal of the same. The plaintiffs, not having established their claim by coming forward at the proper time to show that their interest would be adversely affected, are bound by the proceedings and cannot restrain the collection of the assessments to pay the bonds issued for the improvement of the land. The presumption is, and the final decree has adjudged in this case, that the land has been benefited by the drainage district more than the burdens assessed against it for such purpose."

"The plaintiffs urge that Pate is insolvent, but this is not material, as the liability is on the land, which has been benefited by the proceedings. The plaintiffs further insist upon the familiar principle that, as the mortgage is for the purchase money, executed simultaneously with the deed to Pate, the title did not vest in him. That is true, for the purpose of preventing the vesting of dower right in his widow or the lien of a docketed judgment. But it has no application here. Pate has a conveyance of the land and is in possession of the same, and the property is liable for taxes or legally adjudged assessments in his hands.

"Under the statute, he was the proper party to represent such land in the formation of the drainage district, and it is bound for a *pro rata* payment of the bonds issued and the interest thereon, just as it is for taxes thereon."

There was a petition to rehear that case (171 N. C., 505), which was

fully argued and carefully considered by the Court. There was an opinion with two concurring opinions, and a dissenting opinion. The Court said, in the opinion in chief, as follows:

"The *feme* plaintiff set out her chain of title down to August, 1913, when she conveyed to George B. Pate and took from him a mortgage back to secure the purchase money. Her complaint averred that she and those under whom she claims had no notice served on her, personally, of the proceedings for the assessments made in said drainage district; that said George B. Pate was insolvent, and asked a restraining order against the collection of said assessment."

"It is very evident that by the expression, 'those under whom she claims,' the *feme* plaintiff refers to the grantors in the deeds set out in her chain of title, and not to George B. Pate. The answer does not deny, but asserts, that the latter, who is in possession, has been served with summons in the cause. In our former decision we called attention to the fact that the statute did not require that mortgagees and lien holders, by judgment or otherwise, should be served with summons; that to require them to be parties would greatly increase the difficulty of creating these drainage districts, and they would have no interest to serve in the creation thereof. As was said in *Drainage Comrs. v. Farm Assn.*, 165 N. C., 701, where the point was presented, mortgagees and lien holders are not required to be served with notice personally, because 'A mortgage is subject to the authority to form these drainage districts for the betterment of the lands embraced therein. The statute is based upon the idea that such drainage districts will enhance the value of the lands embraced therein to a greater extent than the burden incurred by the issuing of the bonds, and the mortgagee accepted the mortgage knowing that this was the declared public policy of the State.'

"In our former opinion we held that it was no more necessary that mortgagees and other lien holders should be consulted in the formation of such districts than to permit a mortgagee or lien holder in the like absence of statutory provision to enjoin an assessment for the payment of sidewalks or streets or other improvements of property. We said that the proceeding was *in rem*, and that the decree for the formation of the district could not be made until a majority of the original landowners and the owners of three-fifths of all the land which will be affected have signed the petition, and until all other landowners in the district are notified, and that the decree creating the district must be presumed to have been regularly granted and advertisement of notice for other persons interested in the land has been made as required by sections 5 and 15, chapter 442, Laws 1909, and section 1, chapter 67, Laws 1911. The complaint does not aver that the plaintiff is the owner of the land, but, on the contrary, that George B. Pate is the owner and in possession and

does not negative that notice by publication was duly made as to all others in interest, but merely avers that the *feme plaintiff* was not served personally, which is not necessary.

"The Drainage Act has been held constitutional, and the validity of the district laid off under it cannot be attacked collaterally. *Newby v. Drainage District,* 163 N. C., 24.

"The district has been formed, the assessment made without objection from landowners, and Laws 1909, ch. 442, sec. 37, provides that the collection of assessments shall not be defeated, where the proper notices have been given, by reason of any defects occurring prior to the order confirming the final report, but that such report shall be conclusive that all prior proceedings were regular, unless appealed from. This is absolutely necessary, if the public are to be protected in their purchase of the bonds put upon the market. It is to be presumed that when the court has rendered such final judgment and the bonds are issued, there will be no interference with the collection of the assessments to pay the bondholders, but that all controversies were thrashed out and settled before such final judgment.

"Though the proceeding to create the drainage district was instituted before the plaintiff executed her deed to Pate in August, 1913, yet it may well be that the summons, as the answer avers, was served on him after that date and before the final judgment making the assessments and directing the issue of the bonds. This is another reason why the motion should be made in that cause, where the facts in regard to the proceedings are of record." . . .

"The mere fact, so strongly insisted on by plaintiff's counsel, that while this assessment is only $445, all the assessments on this tract aggregate $2,200 on a tract of land which brought, before it was drained, $4,000, is a matter that was doubtless considered before the decree making the assessments and directing the issue of bonds was entered. The presumption is, that the land was benefited far more than the amount of these assessments, or objection would have been made by Pate, the landowner, or by the plaintiff, as to whom notice by publication is by the statute presumed to have been given. But if there has been any wrong done, it is in that cause that the assessment should be reconsidered and upon proper proof reduced or reaffirmed." While the aggregate assessments were $2,200, they accrued in eight annual payments, averaging $275 per year, or less than 81 cents per acre each year for eight years, less than the annual benefit, according to the decree, and after the eight years the land would be free.

In accordance with this opinion, the petitioner, Mrs. Banks, made this motion in the original cause in Craven County, alleging that no summons had been served on her; that no advertisement had been made for

her or any owner of the land sought to be charged; that the assessment was excessive, and that the land has not been benefited by the construction of said drainage district. This notice was served personally on the Commissioners of Moseley Creek Drainage District, and a notice was served by publication on all landowners and parties interested, and George B. Pate was made a party to the proceeding by a summons duly served, and he appeared in said cause. The Court finds the facts contrary to all the above allegations, except as to personal service on Mrs. Banks.

When the case was here before, the plaintiff, Mrs. Banks, complained that she was damaged because she was mortgagee of the 335 acres which she had conveyed to Pate, and that the assessments impaired the value of her security. She now complains on the entirely different ground that she conveyed to Pate by warranty title, and that if she had known of the assessments she would have added the amount of the assessments to the purchase price to recoup the damages she is liable to Pate on the account of such assessments. By her affidavit, it appears that she conveyed the land to Pate on 30 August, 1913. The clerk finds that the proceedings forming the district were regular in all respects, except that there appears to have been no actual *personal* service of summons or notice on Mrs. Banks or Moses Spivey, who was at that time her husband, but that due publication was made for all landowners to appear in said proceedings, as required by law; that viewers were duly appointed and made their report within the time allowed by law; that due notice of the filing of the report was given to all landowners by publication, as required; that the report having been on file in the office of the clerk of the court for the time required by said statute, and no exceptions filed, the clerk affirmed the report and ordered the viewers to proceed, which they did; and, further, that they duly filed the final report, of which notice was given by publication, and for twenty days the report was open to the inspection of the landowners and all others interested, and at the end of said time said report was duly confirmed, and there was no appeal. The plaintiff files an affidavit, in which she recites that during the time the proceedings were pending, and when judgment confirming the assessments was made, 17 April, 1911, she lived within 10 miles of the land, and that when she conveyed the land (335 acres) to George B. Pate, 30 August, 1913, she was residing at Kinston, within 8 miles of the land.

The clerk further found, "From a careful examination of the report of the viewers filed in this cause, and carefully considering the assessments and classifications made of said land, that said land was benefited far more than the amount of the assessments thereon. And, upon fully considering the same, I am of the opinion that the amount of said assessments should not be reduced, but, on the other hand, said assessments are

reasonable, and that the benefits to accrue to said land from the improvements, in my opinion, greatly exceed said assessments, and that said assessments and classifications so made be and the same are in all respects approved and confirmed."

This finding was struck out by the judge, on appeal, on the ground that it was not justified by the evidence, but he made no contrary finding. It is clear that this tract of land is liable for a proper assessment in return for the benefits accruing to it from said drainage. It was not necessary that the owner should have assented to the formation of the drainage district, but only that the necessary number of the owners should have assented, which is not denied. If the land had been omitted by accident from the assessment, upon proper notice it could at any time be assessed, *nunc pro tunc.*

We have held that a mortgagee, as Mrs. Banks claimed to be, in the former case, was not entitled to notice. *Drainage Commission v. Farm Association,* 165 N. C., 701, cited in this case, 171 N. C., 505, as above quoted. But, conceding that she was the owner of the land when the proceedings were instituted, and that she was not bound for lack of personal service, by the judgment, which was not personal to her, and is only *in rem* upon the land, still it was admissible in this proceeding to notify the owner in possession and have the lands assessed in this proceeding, *nunc pro tunc.* The clerk accordingly finds: "Said assessments were made and duly filed, as required by law, on 17 April, 1911; the first assessment due and collectable thereon accrued in October, 1914, according to law, and during said period no portion of said assessments was due and collectable. On said 17 April, 1911, the assessments were duly confirmed."

The clerk further finds that, upon the facts appearing on this motion, he "caused the notice and summons, above referred to, to be served on George B. Pate, to show cause, if any he had, why said land so owned by him should not be liable for the assessments due thereon. And upon his appearance, through counsel, and upon the filing of his said answer, and from the whole evidence before me, it appears that the benefits to said land, as found by the viewers, have actually accrued to said land; since the completion of the land for the drainage thereof the full benefits to said land having been received since its purchase by said George B. Pate." And the clerk further adjudged that each of the said assessments (for the years 1914 to 1921, inclusive) were and became respectively liens upon said land from the date each of them respectively fell due, and became collectable. And the said land was and became liable to said liens from and after the date of each of said assessments thereon became due and payable, and that therefore said land is liable for each of said assessments as the same would be liable for taxes thereon to the same

extent. "This finding of law was reversed by his Honor, who held that the entire amount of said assessments were a lien upon the lands at the time they were conveyed by Mrs. Banks, then Mrs. Spivey, to George B. Pate, and should be collected as they respectively matured." It is true, the lien was adjudged 17 April, 1911, but this is not an encumbrance like a mortgage to secure a past indebtedness, but payments for future benefits, all accruing to George B. Pate after his purchase of the land.

It is inconceivable that George B. Pate, who bought and entered upon this land 30 August, 1913, was not fixed by actual physical notice of the drainage district and its ditches at the time he entered upon the land, or later if the work was done after that time. He has not appealed from the judgment of the court in this case, directing his land to be made liable for the collection of the assessments falling due thereon in 1914, 1915, 1916, 1917, and 1918, all of which have fallen due since he took possession in August, 1913. It is a matter between Pate, the owners of the bonds, which have been sold upon the faith of the decree in which his grantor was made a party, and the commissioners of the drainage district. Whether he can recover against Mrs. Banks on her warranty is a matter which could properly come up only in an action by him against her upon such warranty.

But as the case is before us, we think it proper to say that the view of the clerk is correct, that the lands are liable to the drainage assessments, just as it is liable for other taxes as they fall due from time to time. As owner of the land, he does not have to consent to the assessment of either the drainage tax or county or State taxation. The drainage tax becomes a lien, just as the benefits accrue, *i. e.*, annually. The decree in the drainage district is not a personal liability of Mrs. Banks, nor is it a personal liability of George B. Pate. It is a lien *in rem,* accruing annually and resting upon the land into whosesoever hands it may be at that time. Pate, as purchaser, entered into possession of the land nearly two and a half years after the final decree establishing the drainage district, and necessarily with physical knowledge of the drainage district. While such lien was decreed by the final judgment 17 April, 1911, the assessments were not liens then, but only became such as they subsequently accrued, respectively. They were not actual liens and collectable till each fell due, in turn, in the years 1914 to 1921, and therefore not encumbrances within the meaning of the warranty clause of the deed, any more than taxes falling due in each future year. We do not see that Mrs. Banks has any cause to restrain the collection of the assessment for drainage, upon the allegation that she would be liable on her warranty. The future benefits are adjudged to be more than "the charge."

The final decree was made 17 April, 1911, after all the publicity given by the repeated publications and the viewers going upon the property,

making their survey and filing their report. Though Mrs. Banks may not have had notice actually served upon her, she must have had notice of the drainage work being actually done upon her land, and should have proceeded to ask a reassessment if it was excessive. She would have had no right to have her land exempted therefrom, more than three-fourths of the landowners having assented to the formation of the district, as is conclusively shown by the recitals in the judgment. When Pate purchased the land he must have had physical notice of the drainage canals, and if they were not begun till after his purchase, then he at least had physical notice, and should have taken the same step for revaluation of the assessment. The land, 335 acres, cannot escape its liability. It is merely a question of the amount of the assessment, and of this the landowner, whether it was Mrs. Banks or George B. Pate, should have taken steps in apt time to ask a reassessment. The clerk finds that Pate had actual notice of these proceedings by the summons served on him in the former case, October, 1914, and he has asked no reduction of the assessment against the land, nor has he asked to be exempted from the district, but with full knowledge has continued to receive the benefits.

Laws 1909, ch. 442, declares: "The drainage of swamps and the drainage of surface water from agricultural lands, and reclamation of tidal marshes shall be considered a public benefit and conducive to the public health, convenience, utility, and welfare." This makes the general drainage act a police regulation, and proceedings thereunder an exercise of the right of eminent domain.

The amendatory act (Laws 1911, ch. 67, sec. 1) provides that if the owners of any land are unknown or cannot be found, that publication shall be made (which, the Court finds, was done in this case), and that the court shall thereupon assume jurisdiction as to the land owned by such parties, in the public interests. This publication having been made, every presumption is in favor of the regularity of the judgment, and Mrs. Banks (then Mrs. Spivey) not having come forward, the presumption is that her residence was not known, and the substituted service by publication is valid and, furthermore, she is also estopped, as well as Pate, by laches in not coming forward and asking for a reassessment, when, in addition to the publicity of the viewers going upon the land, there was the physical installment of the drainage system and repeated publication of the notices.

Even if this were not so, *Lumber Co. v. Comrs.*, 173 N. C., 117, is not in point, for that case especially refers to *Banks v. Lane*, 170 N. C., 14, and distinguishes it, holding that Pate was a party to that action, as he was, and as he also is in this, and in neither did he ask a reassessment and reduction nor appeal. He certainly is not entitled to have the land exempted from liability. If not an original party, he has had twice the

opportunity to make objection to the assessment.

While the judgment of his Honor that the assessments are collectable out of the land is correct, we do not concur in his opinion expressed, that the future assessments, to balance the benefits accruing from 1914 to 1921, were encumbrances at the date of the final judgment on 17 April, 1911. This was a "charge" to rise *in futuro* against the land, from time to time, into whosesoever hands the land should pass. The "charge" runs with the land, as do the benefits, both based on the drainage.

Affirmed.

A. B. HUNTER & CO. v. J. L. SHERRON.

(Filed 16 October, 1918.)

1. Courts—Discretion—Recalling Witnesses—Appeal and Error.

Permitting a witness to be recalled and testify, though contradictory of his first evidence, is in the discretion of the trial judge, and not reviewable on appeal.

2. Contracts, Written—Vendor and Purchaser — Fraud—Opinions—Mistake of Law.

Where a seller of goods has induced a transaction by a false representation, upon which the purchaser has relied, and which formed a material inducement, without which the trade would not have been made, etc., the question as to whether such representation was a mistake of fact or of law, and therefore not a false representation, will not affect the purchaser's right to annul the contract as having been obtained by fraud.

3. Contracts, Written—Fraud—Parol Evidence.

Where a written instrument sued on is sought to be invalidated for fraud, illegality, or failure of consideration, parol evidence thereof is admissible, and not objectionable on the ground that it varies or contradicts the writing.

4. Same—Vendor and Purchaser—False Representations—Bills and Notes—Consideration.

A seller of fertilizer represented to a purchaser, an illiterate man, that if he would sign a note with another purchaser, it would permit both shipments to be made in the same car and obviate the necessity of his taking two notes, and that it would be the same to him if he "signed one note as if it were two": *Held*, the statement was of the fact that the purchaser would only have to pay for his own fertilizer; and, as to the other fertilizer, there was a failure of consideration, and evidence thereof was competent.

APPEAL by plaintiffs from *Stacy, J.*, at March Term, 1918, of WAKE.

A. J. Fletcher and R. N. Simms for plaintiffs.
Robert W. Winston for defendant.

CLARK, C. J. To the issue, "Was the note sued upon in this action procured by fraud on the part of the plaintiff, as alleged in the answer?" the jury responded "Yes." The plaintiffs excepted because, after the defendant had testified he was allowed to go on the stand again the next day and offer testimony which the plaintiffs claim was contradictory. The permission for the witness to be recalled was in the discretion of the court, and not reviewable.

The plaintiffs rest their appeal almost entirely upon the refusal to charge, as requested, "That even if the jury should find as a fact that the plaintiffs misrepresented to the defendant the legal effect of signing the note, this would not defeat the plaintiffs' right to recovery, since the plaintiffs' statement was a mere matter of opinion and could not be a false representation."

In the notes to *Wollam v. Hearn,* 2 White & Tudor Ldg. Cas., Part I, p. 988, it is said: "Whatever doubt may exist in other cases, it is clear that one who induces the execution of an instrument by a false or mistaken statement of its legal effect or operation should not be allowed to take advantage of an error which he has contributed to produce." *Champlin v. Laytin,* 18 Wend., 407.

This is an action upon a note for the balance alleged to be due upon the purchase money of fertilizers, and the allegation in the answer is that one of the plaintiffs, A. B. Hunter, approached the defendant to induce him to buy said fertilizers, and after the defendant had agreed with Hunter for the purchase of fertilizers for himself, "The said Hunter wrongfully and, with the intent to cheat and defraud, falsely and fraudulently pretended and represented to this defendant that if he would agree to have his fertilizers shipped in the car with the fertilizers of the defendant J. S. Brinkley, that it would save his making two shipments and be more convenient to plaintiffs, and it would save his preparing two notes, and this defendant was requested to sign a note for his part of the fertilizers, together with defendant Brinkley, under the belief, fraudulently and falsely induced by the said A. B. Hunter, that the purpose and effect of this defendant's executing a note together with said Brinkley would have the same legal effect; and this defendant, relying explicitly upon said Hunter's representations, which were falsely and fraudulently made, and believing that he would only be liable for and called upon to pay that part of the said note which was represented by the fertilizers bought by him, as aforesaid, consented to sign a note; that as this defendant is informed and believes, the representations made to him and his co-defendant were falsely and fraudulently made, and with the purpose and intent to cheat and defraud this defendant out of his property, and to make him become and be liable for the other debt of

the said Brinkley, all of which was without the defendant's knowledge or consent."

On an allegation that a contract is obtained by fraud, parol evidence is always admissible. Bigelow on Fraud, 174, sec. 8.

It is competent to show by parol testimony that one who has become joint obligor is in fact only a surety. *Welfare v. Thompson,* 83 N. C., 276. Testimony by the defendant tending to show an additional feature, how the note should be paid, is admissible. *Bank v. Redwine,* 171 N. C., 565; *Typewriter Co. v. Hardware Co.,* 143 N. C., 100; *Evans v. Freeman,* 142 N. C., 61; *Carrington v. Waff,* 112 N. C., 115.

Allegations of fraud, illegality, or want of consideration are exceptions to the general rule that evidence of an alleged oral agreement, contemporaneous with the execution of a note, are not competent to contradict or vary the terms of the written contract. *Carrington v. Waff, supra.* In this case, as Sherron purchased his own fertilizer on his own credit, there was a total failure of consideration as to Brinkley's fertilizer, for Sherron got no part of Brinkley's fertilizer and no benefit therefrom. *Taylor v. Smith,* 116 N. C., 531; *Braswell v. Pope,* 82 N. C., 57; *Kerchner v. McRae,* 80 N. C., 219.

The evidence of fraud in this case tended to show that it was perpetrated, not by an agent, but by the principal, and not as to a question of law, but as to a fact. The representation, "It will be the same with you if you sign one note as if there were two," is equivalent to saying that the plaintiffs would not hold Sherron liable on the note, except for his own fertilizer. That the defendant relied upon it was not ignorance of law, but reliance upon a statement of fact by the plaintiff. The jury, having found this to be the fact, properly found that there was fraud in procuring the execution of the note for the full amount, including Brinkley's part of the fertilizer. *Novelty Co. v. Moore,* 171 N. C., 704.

It was in evidence that defendant Sherron could not read handwriting, and that when he signed one note to save the plaintiff the trouble of signing two notes, that Sherron did this in reliance upon Hunter's statement. It was also in evidence that the plaintiff, Hunter, admitted that Brinkley bought his own fertilizer, and that he had presented a separate bill to each for their respective part of the fertilizer.

This is not the case of a party who can read having a deed put before him for execution, or, if unable to read, not demanding to have it read over and explained to him. In such case there is negligence, and the party, in the absence of fraud, cannot be heard to deny his own act and deed; but here the testimony is, that Hunter represented to the defendant, who was illiterate, that he could sign the two notes merely as a convenience, and that he would not be responsible, except for his own part of the fertilizer, and that the defendant, relying upon such statement,

signed the note. This was not ignorance of law, but a misrepresentation on the part of Hunter, as the jury find, intended and calculated to deceive the defendant. Besides, as to him, the note as to Brinkley's part of the fertilizer was without consideration.

No error.

D. A. BAKER v. J. J. EDWARDS & SON.

(Filed 16 October, 1918.)

1. Reference—Exceptions—Issues Tendered—Waiver.

Where the trial upon a compulsory reference has been concluded before the referee, without exception or demand for a jury trial, or issues submitted, the mere exception to the order of reference will not have preserved this right; and where the party now demanding such trial has won before the referee, and the report is before the judge on his adversary's exception, his not having presented the issues he desires the jury to pass upon, and participating in the controversy without objection until the referee's findings have been reversed, will be deemed a further waiver of the right.

2. Same—Satisfactory Report.

Where a party excepting to a compulsory reference has won before the referee, he is not relieved of the requirement that he must preserve his right to a trial by jury by making a demand therefor and submitting the issues he desires to be thus tried, etc., in apt time, even upon his adversary's exceptions.

3. Same—Estoppel.

A party who has excepted to a compulsory order of reference has an election either to preserve his right to a trial by jury or to proceed under the order of reference without it; and his taking the latter course, or making use of it, without objection, will exclude the other one; and where he has not preserved his right to a trial by jury, but attempts to do so by making demand and tendering issues after the judge has reversed the findings of the referee, he will be concluded by the order of the judge, though the findings of the referee were satisfactory to him.

4. Reference—Exceptions—Issues—Purpose of Reference.

Requiring issues to be submitted on exceptions taken on the hearing of a case before the referee is for the purpose of eliminating questions not controverted, and reducing the inquiry to a smaller compass.

ACTION tried before *Stacy, J.*, at January Term, 1918, of WAKE, on exceptions to the report of a referee.

The following is the statement of the case on appeal, as agreed upon and signed by the attorneys of the respective parties, omitting some formal and immaterial parts:

This was a civil action in the Superior Court of Wake County. After the pleadings were filed and the trial entered into before Judge Charles M. Cooke and a jury, the court of its own motion made an order referring the case to Murray Allen, Esq., as appears in the record. To this order both plaintiff and defendant excepted and reserved their respective rights to a jury trial.

The referee executed the order of reference, and made his report to the April Term, 1917, of the Superior Court of Wake County. At said term of court, by consent an order was made, allowing both parties sixty days in which to file exceptions to the report of the referee, as of April Term, 1917. That term of court ended 4 May, 1917, and defendants filed their exceptions on 30 June, 1917, which appear in the record. Plaintiff did not file exceptions. The case was calendared for hearing on trial and motion dockets upon defendant's exceptions at more than one term of court in the fall of 1917, but, not being reached for trial, was continued.

The exceptions came on to be heard before his Honor, Judge W. P. Stacy, at the 2d January, 1918, civil term of the Superior Court of Wake County, and was heard and fully argued by counsel on both sides. His Honor took the evidence and typewritten briefs on behalf of plaintiff and defendants, and, after considering the same, announced he had reached a conclusion different from that of the referee, and he was of the opinion that plaintiff had not sustained his contention, and would sustain the exceptions and find the facts from the evidence according to defendant's contention. Whereupon, for the first time since the reference by Judge Cooke, plaintiff demanded a jury trial or that the case be remanded to the referee, and plaintiff tendered the issue stated in record. His Honor refused to submit the case to the jury or to remand it to the referee, and stated that, viewing the evidence as he did, he would render judgment in favor of the defendants, except that the plaintiff would be allowed to cash the check given him by the defendants and which he had held. His Honor suggested to defendants to submit form of judgment to him the next morning. This was done, and his Honor asked if there was any objection to the form of the judgment. Plaintiff's counsel stated that the judgment was in proper form, but again contended that plaintiff had the right to a trial by jury upon the issues tendered, and again demanded a jury trial. His Honor refused to submit the issue to the jury. Plaintiff excepted. His Honor rendered the judgment set out in the record, to which plaintiff excepted.

Plaintiff insisted upon his right to have the issue tried by jury, and excepted to a refusal of the same, and appealed.

The plaintiff assigned the following errors:

1. That his Honor refused to submit the issue tendered by the plaintiff, the reference being a compulsory reference and the plaintiff having

excepted to the order of reference and reservd his right to a trial by jury.

2. That his Honor signed the judgment set out in the record.

Manning & Kitchin for plaintiff.

A. Jones & Son and James H. Pou for defendants.

WALKER, J., after stating the case, as above: There appears to be but one assignment of error in this appeal, which is, that the court refused the plaintiff's request for a trial by jury, under the circumstances detailed in the statement of the facts by us. We discover no error in this ruling.

The procedure to be followed when a party has duly excepted to a compulsory reference and thereby reserved his constitutional right to trial by jury has been so often considered and so thoroughly settled that we need do little more than refer to some of the precedents. *Driller Co. v. Worth,* 117 N. C., 515 (*S. c.,* 118 N. C., 746); *Taylor v. Smith,* 118 N. C., 127; *Kerr v. Hicks,* 133 N. C., 175; *Ogden v. Land Co.,* 146 N. C., 443; *Simpson v. Scronce,* 152 N. C., 594; *Pritchett v. Supply Co.,* 153 N. C., 344; *Mirror Co. v. Casualty Co.,* 153 N. C., 373; *Robinson v. Johnson,* 174 N. C., 232, and *Loan Co. v. Yokley,* 174 N. C., 573.

In *Simpson v. Scronce, supra,* we said: "It further appears that, 'Upon said exceptions, the plaintiff demanded a trial of the same by a jury.' He did not tender any issue as to any controverted fact which he desired to be submitted to a jury, but simply asked, in a general way, for a jury trial upon the exceptions filed by him. Some of the exceptions involved questions of law, and of course they could not be tried by a jury, and if, upon any exceptions which involved an issue of fact, the plaintiff wished to have a jury trial, he should have tendered the proper issue."

And in *Driller Co. v. Worth, supra,* it was held: "Where a party promptly insists upon reserving his right of trial by jury, and causes his objection to be tendered of record, when the compulsory order of reference is made, he may still waive by failing to assert it in his exceptions to the referee's report. *Harris v. Shaffer,* 92 N. C., 30; *Yelverton v. Coley,* 101 N. C., 248."

"The law implies that the party objecting will give timely notice of the specific points upon which he elects to demand a trial by jury, instead of submitting to the findings of the referee, in order that the opposing party may know how to prepare to meet him by summoning the material witnesses if necessary." And, again: "Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report. Where there was a compulsory reference objected to by defendants, and the referee filed fourteen find-

ings of fact, some of which related to questions not in issue under the pleadings, and defendants filed exceptions to the findings, a demand at the end of their exceptions for a jury trial on all the issues raised thereby was too general to entitle them to such a trial." *Justice Brown* says, in *Alley v. Rogers,* 170 N. C., 538: "It has been frequently held that, although a party duly enters his objection to a compulsory reference, he may waive it by failing to assert such right definitely and specifically in each exception to the referee's report, and by failing to file the proper issues," citing *Driller Co. v. Worth, supra,* and cases in Anno. Ed. *Keerl v. Hays,* 166 N. C., 553.

But the case of *Robinson v. Johnson, supra,* is decisively against the appellant's contention. We said in that case: "Plaintiffs have clearly waived their constitutional right to the trial of the issues in the case by a jury, as they failed to except to the referee's report, and did not tender any issues at all, not even on the defendant's exceptions. This was really tantamount to an agreement on their part that the judge should pass upon the defendant's exceptions without a jury. Numerous cases support the view that there was a clear waiver of trial by jury," citing cases.

The case of *Loan Co. v. Yokley, supra,* is more like this one than any of the others we have cited. There it appears that plaintiff filed no exceptions, but was content with the report of the referee, which he deemed to be in his favor, and defendant filed an exception, which was sustained; no objection, as here, being offered to the court passing upon it. But the exact identity of the two cases, both in fact and in law, will be better shown by quoting from the statement of the case by *Justice Allen,* who wrote the opinion: "His Honor, then, over the objection of the plaintiff, made an order of compulsory reference to state the account between the plaintiff and the defendants. The referee appointed in the order, after hearing evidence for the plaintiff and the defendants, made his report to a subsequent term of the court, in which he found the facts as contended for by the plaintiff. The defendant filed exceptions to said report. The exceptions were heard and were sustained, the judge finding the facts as contended for by the defendants. The plaintiff moved for a confirmation of the report of the referee, but stated that if the report was not confirmed it desired to note exceptions and formulate an issue or issues to be submitted to a jury. There was no objection made to the court hearing and passing upon the exceptions of the defendant to the report, nor did the plaintiff tender any issues upon the exceptions, nor ask for any issues to be submitted to a jury until after the judge had heard and passed upon the exceptions." Those are the same facts upon which we now must pass, and in reference to them *Judge Allen* said: "These findings of fact are supported by evidence and are conclusive

upon us, and the plaintiff waived his right to have a jury trial upon them by failing to demand a jury upon the exceptions. The plaintiff could not take its chance with the judge for a favorable decision, thereby consenting that he should hear the exceptions and then ask for a jury trial if the decision was unfavorable." It will be noted that in both cases, *Loan Co. v. Yokley, supra,* and the one now being considered, the plaintiff had a favorable report from the referee, and therefore filed no exceptions, but the defendant did file an exception, and the judge sustained this exception and virtually reversed the finding of the referee, as the judge did in this case. The plaintiff then asked for a trial by jury, but it was held by this Court, sustaining the judge below, to be plain that he had waived his right to such a privilege by not asserting it in the proper way and at the proper time.

It is argued, though, that plaintiff could not except to a report favorable to himself. Of course not; but if he elected to stand by this favorable report and ask a judge and not a jury to confirm it, he is clearly bound by his election, once made. He had an alternative remedy. The defendant had attacked the report by exceptions, alleging radical error in it, and if plaintiff was not willing, as his conduct did not indicate, that the judge should hear and decide upon these exceptions without a jury, he could have enforced his constitutional right by framing such issues on defendant's exceptions as he thought were proper, and have them passed upon, not by the court, but by a jury, so that he might exercise his constitutional right and have the full benefit thereof by having a jury say whether there was any error of the referee, as specified in the defendant's exceptions. But this he did not do, but, by his silence, if not by his affirmative action and conduct, he manifestly evinced his purpose to make what he considered a wise and safe election, and have the judge decide upon the exceptions of defendants. If we should permit him now, after deliberately making this choice, and lost, to take another chance, it would not be fair to the defendants, who had trusted the matter to the judge, and who supposed, and had the right to suppose, that the plaintiff had likewise done so. The law rarely gives a litigant more than one fair chance. Where he has two remedies, he may choose between them and select that one which he deems the best for him, but he must abide the result of his choice. This is not only legally but morally right.

An election of remedies is defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts, and it was said in the Scottish law to be based upon the principle that a man shall not be allowed to approbate or reprobate. His taking the one, or making use of it, will exclue or bar the prosecution of the other. The doctrine is gen-

erally regarded as being an application of the law of estoppel, upon the theory that a party cannot, in the assertion or prosecution of his rights, occupy inconsistent positions. 9 R. C. L., pp. 956, 957, par. 1. The principle is thus stated in 9 Rul. Case Law, at p. 958, par. 3: "The doctrine of election of remedies applies only where there are two or more remedies, all of which exist at the time of election, and which are alternative and inconsistent with each other, and not cumulative; so that, after the proper choice of one, the other or others are no longer available. This is upon the theory that, of several inconsistent remedies, the pursuit of one necessarily involves or implies the negation of the others." And 15 Cyc., 262, states it this way: "An election, once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial right inconsistent with the asserted by the election, or to the maintenance of a defense founded on such inconsistent right."

The plaintiff's argument cannot be limited in its scope or conclusion to the suggestion that, as the report was favorable to him, he could not except, for it reaches beyond that statement and must take in, as one of its necessary premises, that the plaintiff could proceed to have a jury hearing upon the defendants' exceptions if he had submitted issues for the purpose. The report would have remained intact and therefore still in his favor, had he succeeded upon these issues before the jury, for the exceptions were all that threatened his recovery upon the favorable report of the referee. And the same result would have followed had he convinced the judge of the invalidity of the exceptions, and, consequently, of the correctness of the report. When the plaintiff joined in the argument of the exceptions, without asserting his right to a jury trial, his silence gave implied assent to the course adopted by the judge. See Broom's Legal Maxims (6 Am. Ed.), p. 108, star p. 140, applying the maxim, *Qui tacet consentire videtur*. It was a clear waiver of any such right. 2 Comstock, 281. The above maxim is closely related to another, that the acquiescence of a party who might take advantage of an error obviates its effect (*Consensus tollit errorem*); and so, if he does not object to a certain procedure, nor relies and insists on one more beneficial to himself, he likewise, upon the same principle, is bound by his silence, as if he had expressly approved that course which was taken by the court. "On the maxim under consideration depends also the important doctrine of waiver—that is, the passing by of a thing—a doctrine which is of very general application, both in the science of pleading and in those practical proceedings which are to be observed in the

progress of a cause from the first issuing of process to the ultimate signing of judgment and execution." Broom's Legal Maxims, *supra.*

It is also to be said—and this reason was strongly put by Mr. Pou—that while plaintiff was experimenting with his first choice, hoping to win out, the judge delivered the final judgment, which made it all too late for the plaintiff to ask a reopening of the case, when he discovered that he had been defeated before the tribunal of his own choice. The case was then closed beyond relief to the plaintiff, except by appeal.

The object in having issues upon exceptions is that many questions not controverted may be eliminated, and the issues confined to those items which really are in dispute, instead, if it can be avoided, of going over the entire field of inquiry by the general issue, it being the one tendered by the plaintiff in this case. It has the advantage of reducing the controversy to a smaller compass, and compulsory reference would be of no advantage, except under such a procedure.

We find no error in the record, and must affirm the ruling of the court.

Affirmed.

S. F. HOLDEN v. M. F. HOUCK ET AL.

(Filed 16 October, 1918.)

1. Trusts and Trustees—Mortgages—Deeds in Trust—Sales—Purchasers—Legal Title.

The legal title to lands held in trust for the payment of a debt is in the trustee, and a purchaser at the sale made in pursuance of the power contained in the deed and in accordance with its terms is entitled to the possession in an action brought to recover it.

2. Same—Equity.

Where land is conveyed in trust to secure the payment of a debt, a purchaser at the sale thereof made in pursuance of the lawful power and terms therein expressed, acquires both the legal and equitable title, when the sale had been conducted with perfect fairness, every one had full opportunity to bid and buy, and there is no evidence of suppression or chilling of the bidding.

3. Same—Injunction.

An injunction served at the sale upon the trustee in a deed of trust to secure the payment of a debt, in this case, after the bidding had closed, when it appears to the Court that the sale was perfectly fair and regular and in accordance with the lawful terms and conditions expressed in the deed, is improvidently issued; and while the trustee should have observed it, if served in time, the courts will not set aside the sale in an action by the purchaser for the possession of the land, the trustor, the defendant in the action, having no real equity to protect and no substantial defense to set up.

4. Ejectment—Issues—Pleadings—Equity.

Where lands have been regularly sold under the terms of a deed in trust to secure borrowed money, and the purchaser, in his action to recover possession of lands, has shown his legal title, and the action has been tried without objection under the usual issue in ejectment, it is necessary for the defendant to plead any equity he may claim and tender proper issues thereon, and having failed to do so, the plaintiff is entitled to recover.

ACTION tried before *Stacy, J.*, and a jury, at February Term, 1918, of FRANKLIN.

Plaintiff brought this action to recover possession of the land described in the complaint. It appears that the land was owned at one time by Mrs. J. A. Turner, who, with her husband, sold and conveyed it to M. F. Houck, who with his wife are defendants.

Plaintiff at the trial introduced in evidence a deed of trust by M. F. Houck and wife, Geneva O. Houck, to Ben T. Holden, which was executed to secure a debt of $3,800 due to W. K. Phillips from M. F. Houck, who is the defendant. This deed contained the usual power of sale. As there was default in payment of the debt, the trustee, Ben T. Holden, sold the land, after due advertisement, and plaintiff became the purchaser, and at a price considerably in excess of the debt and cost and expense of the sale. The trustee thereupon conveyed the land to him on 10 January, 1916. This deed was put in evidence, and plaintiff rested.

Defendants, in their answer, allege that the trustee made the deed to plaintiff before he had received the purchase money; that the property is worth more than it brought at the sale, and that the trustee sold it in one lot, without dividing it into parts and selling each of them separately until the amount of the debt was realized, and they charge, upon these allegations, that the sale was in fraud of their rights, and consequently they have the right to redeem. It is also alleged that, in this action, a restraining order was issued against a sale of the land, and that the deed to the land was made by the trustee after service of the order.

The court submitted the usual issues in ejectment, and charged the jury that if they believed the evidence they should answer them in favor of the plaintiff, and this was accordingly done.

With reference to the collection of the purchase money by the trustee, and the payment of the surplus, after satisfying the secured debt, to the defendants or those entitled thereto, Mr. H. K. Baker, who represented his mother, one of the interested parties, testified: "I am a grandson of Mr. W. K. Phillips. He died 28 July, 1914. At the time of his death he held a note of Mr. M. F. Houck and wife in the sum of $3,800, secured by deed of trust on this property. Mr. Holden was lending money for my grandfather when he died. Mr. Holden would act as

trustee in making these loans. When my grandfather died the note had not been paid. The settlement of the estate was taken up by the executors after the death of my grandfather. The executors called upon Mr. Holden to collect this money. Mr. Holden advertised the land. He told me some time after the land was sold that he had not collected the money, but that it was secured and he could get it any time. I was not at all uneasy about the collection. Mr. Holden still attends to my mother's business, and at this time has some money out for her."

Mr. T. Y. Baker testified: "I am one of the executors of the Phillips' estate. I married his granddaughter. At the time of Mr. Phillips' death he held this note against the Houck's property, and we turned the note over to Mr. Holden and asked him to collect it. Mr. Holden has other matters in hand for us that have not been settled. He told me that this money was secured and he could get it any time. We were satisfied with that statement."

Judgment was entered on the verdict, and defendants appealed.

B. T. Holden and W. H. Yarborough for plaintiff.
W. M. Person and S. A. Newell for defendants.

WALKER, J., after stating the case: There was a motion to nonsuit in this case, which was properly overruled by *Judge Stacy*. Plaintiff had shown, when he rested, that he was the owner at least of the legal title, and this entitled him to the possession of the land, the debt secured by the deed of trust having long since matured. *Wittkowski v. Watkins*, 84 N. C., 456; *Bruner v. Threadgill*, 88 N. C., 361. The plaintiff, by the deed to him of the trustee, acquired the legal title, and stood in the latter's shoes. But we think he also acquired the equitable title. There was really no defense to the action and, as it turns out, the injunction was issued improvidently, as defendants had no equity in the land to protect, or that required protection by restraining the sale. The trustee proceeded regularly to sell the land under the power contained in the deed of trust, and in fact he acted at the request of the parties, or one of them. The sale was duly advertised, and the defendants had the benefit of the full thirty days to object to the sale and enjoin the same if they had any valid reason for doing so, but they postponed action until the very day on which the sale was made, and up to the very moment of the sale, before issuing the injunction. They were so very tardy in the matter that the injunction order was not served until after the sale proper was made, the land having been "knocked down" to the plaintiff before it arrived. There was quite a number of people, including real estate dealers, at the sale, and the biddings were spirited. There is no evidence of suppression or chilling of the biddings, but in

every respect, so far as appears, the sale was conducted with perfect fairness, and every one had full opportunity to bid and to buy. There is not the slightest suspicion of fraud or unfairness, and there does not appear to be any valid defense to this action.

If the plaintiff or those conducting the sale had notice of the injunction before it was completed, we see no reason for allowing it the effect of invalidating the sale, as there is not any equity or other right of the defendants to protect. The party owing the debt had defaulted in paying it, and this entitled the trustee to sell under the power, and it was his duty to do so in order to raise the money necessary for its payment. When an injunction which has been issued to prohibit a sale is disregarded and the sale nevertheless is made, the court doubtless would have the power to declare the sale inoperative if this course was necessary to preserve or protect any right of the party to the suit at whose instance it was issued, as held in *Greenwald v. Roberts,* 51 Tenn. (4 Heiskell), 494. There the Court said: "It is not said that Nathan Greenwald was under an injunction against selling and conveying the land at the time of his conveyance to complainant, and therefore that the conveyance was void. The injunction was intended for the protection and security of Bond, by preventing a conveyance of the land so as to endanger or defeat his claim. The pendency of the suit and the injunction which operated personally on Nathan Greenwald would have the legal effect of making any conveyance by him inoperative, so far as Bond's interest was concerned. But as between Nathan Greenwald and a purchaser from him, the conveyance would not be affected." But as there is no right or equity here to protect, the trustee had the power, and, as we have said, it was his duty, to sell the land under the trust to pay the debt which defendant M. F. Houck had failed to pay, and as the sale was fairly conducted without any suspicion of fraud or of undue advantage having been taken of defendant, and according to the terms of the deed of trust, it foreclosed the equity of redemption and passed the title to the purchaser, who is the plaintiff in this case, and defendants therefore have no further right to redeem.

If the injunction was issued even improvidently, it was, of course, the duty of the trustee to obey it and desist from selling the land, provided he had notice of it in time to do so, but it would be vain now to set aside the sale and the deed because of the injunction when no good would be accomplished thereby, as the defendants have no real equity to protect and no substantial defense to the action.

They consented to try the case on the issues submitted by the court, as they did not object to them, and made no request for issues based upon any equity or defense they may have supposed that they had. The issues which were submitted being those appropriate to an action of

ejectment, there was no question involved but the legal title of plaintiff and his right of possession, and therefore there was nothing to obstruct his recovery.

We may add that a few days after the sale—that is, on 11 January, 1916—the trustee addressed a note to the defendants Mr. and Mrs. Houck, in which he offered to submit a statement showing the surplus due to the trustor after paying the debt secured by the deed of trust and the expenses of the sale, but they seem not to have pressed the matter to a conclusion, but preferred to continue the litigation. The trustee and purchaser had a good reason for not making a settlement as, between them, it being the pendency of the suit in which the injunction issued. The defendants no doubt can get their money at any time by applying to the trustee, who has shown every disposition to act with perfect propriety and with due regard for the rights of those for whom he held in trust.

As we have said, there was no objection to the issues submitted by the court, and no issue tendered as to any equity of the defendants, if they had any. An equity must be pleaded and, of course, proper issues tendered thereon. It cannot be considered under the ordinary issues in ejectment. *McLaurin v. Cronly,* 90 N. C., 51; *Buchanan v. Harrington,* 141 N. C., 39. But there was really no equity.

The defendants were shown to be in possession of the land, and there was no request for instructions as to this matter. There is nothing, therefore, in this exception.

The learned judge ruled correctly upon the evidence and issues, and there is no cause for a reversal.

No error.

M. W. TIGHE ET AL. V. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 16 October, 1918.)

Railroads— Condemnation— Easements— Rights of Way— Deeds and Conveyances—Charter Width.

A conveyance of so much of the owner's land as may be taken in making a connection with another railroad, within the city's limits, according to a certain survey, is not *ipso facto* a conveyance of the full width thereof authorized by its charter; and where a railroad company acquired by deed a less width of land as a right of way than that authorized by its charter, it can take more of the land only by condemnation and compensation, in the absence of further contract.

HOKE, J., concurring in result.

APPEAL by defendant from *Stacy, J.,* at January Term, 1918, of WAKE.

This action is to recover damages for alleged encroachment upon the property of plaintiffs in the construction of a track between Johnston Street and a point near Boylan Avenue bridge in Raleigh.

Upon the complaint, the plaintiffs moved for a restraining order against the construction of the track on their property. The motion was denied, but defendant was required to give bond in the sum of $2,500 to pay all damages and costs that might be awarded plaintiffs in this action. In the judgment overruling the motion for a restraining order the plaintiffs and the defendant waived condemnation proceedings and agreed that the issue as to title to the property in dispute should be tried, and if plaintiffs established title the issue of damages should be tried.

It appeared that one of plaintiffs' elements of damages was the alleged closing of the entrance from Dawson Street to the property of the plaintiffs, and defendant claimed that if the title to the property should be found in the plaintiffs, then the defendant by the exercise of its rights under Revisal, 2569, 2570, 2571, could condemn another entrance to plaintiffs' property and thereby greatly reduce the damages to which they would be liable. In accordance with the agreement, the question only of encroachment was considered in the trial from which this appeal is taken.

The contentions of the defendant supported by evidence are as follows:

1. Chapter 68, Laws 1899, authorized the Raleigh and Gaston Railroad Company to consolidate with other railroad companies and to lease or otherwise acquire their property.

2. Chapter 34, Laws 1899, authorized the defendant company to unite with the Richmond, Petersburg and Carolina Railroad Company.

3. Chapter 168, Private Laws 1901, chapter 1901, authorized the defendant, successor of the Richmond, Petersburg and Carolina Railroad Company, to possess and exercise the powers conferred upon the latter road, and authorized leases, purchases, sales or consolidations between it and other railroad and transportation companies.

4. By articles of agreement and merger and consolidation entered into 11 October, 1915, and filed in the office of the Secretary of State on 15 November, 1915, the Seaboard Air Line Railroad and Carolina, Atlantic and Western Railroad Company formed the Seaboard Air Line Railroad Company, and the latter became possessed of all the rights, privileges and easements formerly possessed by the Seaboard Air Line Railroad.

5. Under the statutes of this State and by the articles of consolidation and merger, the defendant claims that as successor of the Raleigh and Gaston Railroad Company it is entitled to all the rights, privileges and easements of said company, including the right of way herein set out.

6. The deed from Jepthah Horton to the Raleigh and Gaston Railroad Company 12 August, 1853, conveyed "so much of a certain tract of land lying and being in the county of Wake and bounded as follows, to wit: Beginning at S. E. corner of Mrs. Matilda Wedding's lot and running N. 16 poles to a stake, then W. 18 poles to a stake, then S. 16 poles to a stake, then E. to the beginning, containing by estimation 1 acre, 3 roods and 8 poles, as may be taken in constructing the connection between the Raleigh and Gaston and North Carolina Railroad according to survey made by Ed. Myers, civil engineer, to have and to hold to the said party of the second part (Raleigh and Gaston Railroad Company) and its assigns forever, with all and every the appurtenances thereunto belonging."

7. The charter of the Raleigh and Gaston Railroad Company fixed the right of way of said company at forty feet on each side of the center of the track, and it was authorized thereby to take a right of way of that width.

8. The deed from Jepthah Horton to the Raleigh and Gaston Railroad Company was executed and recorded prior to the deed from Jepthah Horton to John Tighe, under which the plaintiffs claim.

9. The land occupied by defendant's track in November, 1916, is a part of defendant's right of way of which it acquired by consolidation and merger with the Raleigh and Gaston Railroad Company.

10. Chapters 140 and 527, Laws 1852, incorporating the Raleigh and Gaston Railroad Company, ratified 2 December, 1852, provides: "Be it further enacted, That to enable the said Raleigh and Gaston Railroad Company to effect a junction and form an actual connection with the North Carolina Railroad Company whenever the superstructures shall have been laid on that part of the road of the North Carolina Railroad Company lying between Raleigh and Goldsboro, as provided in the fifty-second section of the act incorporating the North Carolina Railroad Company, the president and directors are hereby invested with full power and authority to make all necessary contracts for the construction of said road and to resort to the same means for purchasing or condemning such lands as may be required therefor as are provided in the act incorporating the North Carolina Railroad Company."

11. Chapter 82, Laws 1848-9, incorporating the North Carolina Railroad Company, which is referred to in the above mentioned charter of the Raleigh and Gaston Railroad Company, has this provision, among others: "The right of said company prescribed in section 27 of this act shall extend to condemning one hundred feet on the main track of the road, measuring from the center of the same, unless in the case of deep cuts and fillings, when said company shall have power to condemn

as much in addition thereto as may be necessary for the purpose of constructing said road."

12. The defendant contends that the Raleigh and Gaston Railroad Company had power under section 18, chapter 140, Laws 1852, construed in connection with section 28, chapter 82, Laws 1848-9, to take a right of way of the width of one hundred feet on each side of the track.

13. In the general statute on Railroads, Revisal, sec. 2597, it is provided that the width of land condemned for any railroad shall be not less than eighty feet or more than one hundred feet, and defendant contends that under its terms the Raleigh and Gaston Railroad Company was required to condemn a right of way not less than eighty feet in width and not more than one hundred feet in width across the land of Jepthah Horton.

14. The defendant's track, which was constructed in November, 1916, and which occupies the land claimed by the plaintiffs in their complaint, the defendant contends, was constructed entirely within the limits of the right of way acquired by the defendant in its merger and consolidation with the Raleigh and Gaston Railroad Company.

15. The defendant further contends that said track was constructed on said right of way for a necessary railroad purpose, to properly perform its public functions, to supply better facilities therefor, and in order to properly conduct its business as a common carrier of passengers and freight, and in order to supply better facilities for connection with the track of the North Carolina Railroad Company.

16. The defendant also sets up as a defense that if it has encroached upon plaintiffs' land, as alleged in the complaint, such encroachment was made more than five years before the commencement of this action and for the purpose of constructing a railroad thereon, which had been in operation more than two years since such alleged encroachment, and the defendant pleaded in bar of plaintiffs' right to recover damages for said encroachment Revisal, 394, as follows: "No suit, action, or proceeding shall be brought or maintained against any railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by said company for use of its railroads, unless such suit, action, or proceeding shall be commenced within five years after said lands shall have been entered upon for the purpose of constructing said road, or within two years after said road shall be in operation."

The jury having responded to the issue, "Did the defendant encroach upon plaintiffs' land?" in the affirmative, the defendant appealed from the judgment entered thereon.

Armistead Jones & Son and Robert C. Strong for plaintiffs.
Murray Allen for defendant.

CLARK, C. J. The defendant relies upon a deed from Jepthah Horton dated 12 August, 1853, conveying "so much of an acre tract of his land (describing the land) as may be taken in constructing the connection between the Raleigh and Gaston and North Carolina Railroad Company, according to the survey made by Ed. Myers, civil engineer."

The plaintiffs claim as heirs of John Tighe, to whom Jepthah Horton conveyed the balance of the land on 12 October, 1869, or about sixteen years later than the defendant's deed. The defendant laid a single track to make this connection, and has introduced no evidence as to how much of this land was taken by the Ed. Myers survey, and relies upon the presumption that in laying this single track either the 80 feet authorized right of way under the Raleigh and Gaston Railroad Company charter or the 200 feet right of way authorized by the North Carolina Railroad Company charter would prevail. If the former, it would include the *locus in quo;* and if the latter, it would take three-fourths of the tract conveyed to the plaintiffs' ancestor, John Tighe.

The plaintiff introduced evidence tending to show that only one-quarter of an acre was used and occupied by the railroad company under the Ed. Myers survey, and that continuously since the deed in 1869 to John Tighe, under which they claim they have occupied the *locus in quo;* that for a long time it was their home; that on the northern part of the land John Tighe had planted a hedge, and between this hedge and the railroad right of way they had a 10-foot drive on this land, leading into North Dawson Street; that two or three times, more than two years prior to the commencement of this action, the defendant had thrown cinders upon this pathway, but had desisted when forbidden to do so; that in 1916 (less than two years prior to the beginning of the action) the defendant contructed a double track, covered up the entire driveway and hedge, closing the plaintiffs' outlet to the street and making their property undesirable. The defendant introduced no evidence on the above matters, except in confirmation of the building of the double track in 1916 and of the existence of the hedgerow, which is now covered up by the double-track embankment.

While the presumption is that Ed. Myers, the civil engineer, laid out the right of way to the full 80 or 100 feet wide, as authorized by the charter, if necessary to make the physical connection, this is subject to the evidence tending to show that only one-quarter of an acre was used and occupied by the railroad company under the Ed. Myers survey, and the jury, under the instructions of the court, free from error, so found.

In *Hendrix v. R. R.,* 162 N. C., 9, the conveyance to the railroad was of "so much of our land as may be occupied by said railroad, its banks, ditches, and works." This deed was executed in 1862, and the grantee, prior to 1865, constructed a line of railroad through the property, taking

a strip of land 50 to 55 feet in width. The railroad company in 1909 widened its right of way and took additional land for that purpose. It was contended by the plaintiff that, under the language of the deed, the defendant was restricted to the right of way originally occupied. But this Court held that, under such deed, the railroad company could take the necessary land to the extent of the right of way prescribed by the charter.

So, also, in *R. R. v. Bunting,* 168 N. C., 579, the Court held that a railroad company may occupy its right of way to its full extent whenever the proper management and business necessities of the road, in its own judgment, may require it, though the owner of the land can use and occupy a part of the right of way not used by the railroad in a manner not inconsistent with its full enjoyment of the easement.

Indeed, our decisions are uniform that when a railroad company has acquired the right of way by condemnation or by purchase of the right of way, the deed not limiting the conveyance to less than the statutory width (as in *Hendrix v. R. R., supra*), or has entered upon the land and acquired it without condemnation and without conveyance, by reason of the acquiescence of the owner for the statutory time—in all these cases, while the railroad can use only the part actually occupied (the adjacent proprietor using the rest of the right of way *sub modo,* that is, subject to the easement of the railroad), still in all these cases, whenever the necessities of the company require it, it can extend its user of the right of way to the extent of the statutory right for additional tracks or other railroad purposes. This matter has been fully discussed and uniformly decided in many cases. *R. R. v. Olive,* 142 N. C., 264, and the large number of cases there cited, among others, especially *R. R. v. Sturgeon,* 120 N. C., 225; *R. R. v. McCaskill,* 94 N. C., 746; *Barker v. R. R.,* 137 N. C., 214, and the citations to *R. R. v. Olive* in the Anno. Ed. Also, in the cases cited by *Hoke, J.,* in *R. R. v. Bunting,* 168 N. C., 580.

The present case, however, is distinguished from the above, for here the defendant railroad did not acquire the right of way either by condemnation or by occupation, without objection, for the statutory time, nor by a deed for the "right of way," all of which would be presumed to give an easement to the full width of the right of way allowed by the charter or the general law; but the defendant railroad was content to accept a deed specifying as the boundary "according to the survey made by Ed. Myers, civil engineer," and the jury find that this did not embrace the *locus in quo.* The defendant therefore is restricted to the boundary described in its deed. It can now occupy land beyond that limitation by the exercise of the statutory authority of condemnation with compensation, but not otherwise.

No error.

ANDERSON JONES v. A. F. WILLIAMS ET ALS.

(Filed 16 October, 1918.)

1. Mortgages—Lands—Purchase by Mortgagee—Burden of Proof—Evidence —Verdict Directing.

The burden of proof is upon the mortgagee, in his action to recover lands, to show that his purchase from the mortgagor of a part of the lands covered by the mortgage, by other evidence than his deed, was fair, free from oppression, and that he had paid for the land what it was reasonably worth; and where he has failed to introduce such evidence, an answer to the appropriate issue is properly directed in the mortgagor's favor.

2. Appeal and Error—Costs—Prejudicial Error.

The appellant cannot reasonably complain, on appeal, that he has been taxed with a part of the costs, when on the trial the principle issue has been decided against him.

ACTION tried before *Calvert, J.*, at March Term, 1918, of DUPLIN, upon these issues:

1. In what amount, if any, is the defendant Rufus Branch indebted to the plaintiff, Anderson Jones? Answer: $529.50, with interest from 23 December, 1901, and subject to a credit of $38.50 as of 16 January, 1902.

2. In what amount, if any, is defendant Rufus Branch and wife indebted to A. F. Williams, assignee of E. J. Martin & Sons, on account of the notes and mortgages sued on? Answer: $250 and interest from 16 January, 1902, with a credit of $13.91, 3 December, 1902.

3. Was the sale of the 46 acres of land, made by Rufus Branch and wife to Anderson Jones on 23 December, 1901, open, fair, *bona fide,* and made for a fair consideration? Answer: No.

4. What is the fair annual rental value of the said tract of 46 acres of land since 23 December, 1901? Answer: $35 annually.

5. What is the fair rental value annually of the 109 acres of land since December, 1904? Answer: $100 annually.

The court rendered a judgment decreeing a sale of the land and adjudging the rights of the parties, to which plaintiff excepted and appealed.

Stevens & Beasley for palintiff.
H. D. Williams for defendant A. F. Williams.
Henry E. Faison for defendant Branch.

BROWN, J. This case was before us at a former term, and is reported 155 N. C., 179, where all the facts are fully stated in the opinion of *Justice Walker.*

At March Term, 1918, the case was tried before a jury upon issues arising upon exceptions to referee's report.

The plaintiff assigns error in refusing to submit the following issue: "Was the sale of the 46 acres of land, made by Rufus Branch and wife to Anderson Jones on 23 December, 1901, open, fair, *bona fide,* and made for a fair consideration?" We are unable to distinguish between the proposed issue and the one submitted as No. 3 and found against plaintiff.

The plaintiff requested the court to instruct the jury as follows:

"It being admitted that on 23 November, 1901, Rufus Branch and wife, Christianna Branch, reconveyed to Anderson Jones 46 acres of the 245-acre tract, at which time Anderson Jones held a mortgage upon the whole tract, and the relation of mortgagor and mortgagee existed between them; that on account of this relation the law presumes that the transaction was fraudulent; but if the jury shall find from the evidence that the transaction was free from fraud or oppression, and that the price paid for the land, under all the circumstances, was fair and reasonable, then the presumption of fraud raised by the law is rebutted, and the sale and conveyance of the 46 acres of land would be valid, and the defendants would have no right to set the same aside upon this ground."

This instruction is undoubtedly a clear and correct statement of the law applicable to the third issue; but we find no evidence in the record to support it. The plaintiff was the mortgagee, who purchased the 46 acres from his mortgagor.

The law put the burden of proof upon the plaintiff to show by other evidence than the deed itself that the transaction was fair and free from oppression, and that he paid for the land what it was really worth. *Jones v. Pullen,* 115 N. C., 465; *McLeod v. Bullard,* 86 N. C., 210.

We find no evidence in the record tending to show these necessary facts. The court was therefore justified in instructing the jury to answer the third issue "No."

We find no error in the judgment rendered by the court upon the issues.

The court taxed Anderson Jones with one-fifth of the costs, to which he excepts. As the principal issue raised was decided against him, we see no reason for complaint on his part that he was taxed with only a fifth of the costs.

No error.

S. BANE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 23 October, 1918.)

1. **Carriers of Passengers—Riding on Platform—Notice—Statutes.**

Revisal, sec. 2628, requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that such passenger cannot read that language is immaterial.

2. **Same—Call for Station—Stopping Train—Verdict—Findings—Instructions—Proximate Cause.**

Where there is evidence tending to show that a passenger on a railroad train had left his seat in the coach, wherein the statutory notice (Revisal, sec. 2628) had been properly posted, after a station had been called, and was injured in a collision with a derailed car, while standing with one foot on the step of his car, slowly coming to a stop, and it appears that he would not have been injured had he remained seated in the coach, an answer to the issue as to the defendant's negligence in its favor, under a proper instruction as to the defendant's liability under the circumstances, including the principle as to the proximate cause, is a finding that the plaintiff's negligence was the proximate cause of the injury.

APPEAL by plaintiff from *Bond, J.*, at March Term, 1918, of DURHAM.

Bryant & Brogden for plaintiff.
W. B. Rodman and W. B. Guthrie for defendant.

CLARK, C. J. The plaintiff, a passenger on the eastbound train from Raleigh to Norfolk, had paid his way to Farmville, N. C. At Stantonsburg, a small station, just before reaching Farmville, where there was a pass-track, the plaintiff got out on the platform and on the left side of the train, which was on the opposite side to the station, while his train was still moving, when a freight train coming west moved into the siding, pushing ahead of it three cars already on the siding, which ran over a section hand, thereby derailing the front box car, which was empty. This car, leaning over towards the main track, bouncing along on the ties, struck the side of the passenger coach, where the plaintiff was holding to the grab-iron as he stood on the platform, with one foot on the top step. This box car, striking the passenger train, broke some windows in the forward colored coach, the engine and baggage car passing safely, and knocked off the grab-iron which the plaintiff was holding, and the plaintiff received a slight scratch or wound on the hand. The coach in which plaintiff was riding was not injured at all—no windows broken and none of the passengers in any of the coaches were hurt, and plaintiff admits that if he had kept his seat in the car he would not have been hurt.

The court charged the jury, as requested by plaintiff, that "The mere announcement of the name of a station is not an invitation to alight; but when such an announcement is followed by a stoppage of the train soon thereafter, it is ordinarily notification that the train has arrived at the usual place for landing passengers, and under such circumstances a passenger may reasonably conclude that it has stopped at the station and endeavor to get off, unless the circumstances and indications are such as to render it manifest that the train has not reached the proper and usual landing place."

"The court charges you that if you find from the evidence in this case, and the greater weight, that the train upon which plaintiff was riding was struck by an engine or box car owned and operated by the defendant, this would be negligence; and if this was the proximate cause of injury to the plaintiff, and you so find, you would answer the first issue 'Yes.'"

"If you find from the evidence in this case, and by the greater weight thereof, that the plaintiff was a passenger on the defendant's train, going from Raleigh to Farmville, N. C.; that he had not had breakfast, and as the train was approaching Stantonsburg the porter called out the station, and soon afterwards the train slowed down and came to a stop at the usual stopping place; that plaintiff, after the train stopped, stepped upon the platform of the train to get or seek something to eat; that he then caught the iron rails, or grab-irons, for the purpose of alighting, and while in this position a derailed car on a pass- or side-track was run or pushed by the defendant against the passenger train upon which the plaintiff was traveling, and thereby caused the injury to the plaintiff, this would be negligence on the part of the defendant; and if this was the proximate cause of injury to the plaintiff, and you so find, you will answer the first issue 'Yes.'"

The court then instructed the jury that the Legislature had seen fit to enact the following statute (Revisal, 2628) with reference to passengers riding on the platform of trains: "In case any passenger on any railroad shall be injured while on the platform of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside the passenger cars, then in the train, such company shall not be liable for the injury, provided said company at the time furnish room inside its passenger cars sufficient for the proper accommodation of its passengers."

The evidence was uncontradicted, and the jury found that the defendant had complied with the statute by posting up in a conspicuous place the required notice forbidding passengers to ride upon the platform while the train was in motion, and that there was room within the car for the accommodation of the plaintiff and all other passengers. The court correctly told the jury that it was immaterial whether the plaintiff

was a Hebrew and read Yiddish, but could not read English, for the statute did not require the notice to be printed in any other language.

In *Shaw v. R. R.,* 143 N. C., 312, it was held that, though the plaintiff stepped out on the platform under a *bona fide* belief that the train was not moving, and a reasonably prudent person, under similar circumstances, would have so believed, yet, if in fact the train was still moving, the plaintiff could not recover damages sustained by a sudden and violent jerking of the train, which would not have caused the injury if the passenger had remained in the car till the train actually stopped. In *Wagner v. R. R.,* 147 N. C., 315, commenting on *Shaw v. R. R.,* it was held *prima facie* negligence to ride on the platform of a moving train after a station is called, but before it has come to a stop or very nearly so.

This is not the case of stepping off a slowly moving train by the invitation of the conductor, as in *Nance v. R. R.,* 94 N. C., 619, and cases cited thereto in Anno. Ed.

In *Wallace v. R. R.,* 174 N. C., 171, it was held that the railroad company is not relieved of the requirement of a high degree of care to a passenger who steps off the train during a stop at an intermediate station, even though without notice to the conductor and for purposes of his own. The jury were so instructed in this case by the court giving the prayer of the plaintiff to that effect.

The jury found as to the second issue that the train was still moving when the plaintiff was hurt, and that he was on the platform in violation of the statutory notice in the car. It being admitted by the plaintiff that he would not have been hurt if he had remained in the car till the train stopped, the finding of the jury on the first issue that he was not injured by the negligence of the defendant, taken in connection with the charge, is a finding that the negligence of the defendant was not the proximate cause of the injury.

The exceptions as to contributory negligence and on other grounds are therefore immaterial.

No error.

HANNAH H. McEWAN et al. v. S. D. BROWN et als.

(Filed 23 October, 1918.)

1. Wills—Execution—Another State—Real Property—Title.

For a will executed in another State to pass title to real property here, it must also have been executed according to the laws of this State.

2. Wills—Clerks of Court—Probate — Evidence — Commission — Caveat—Statutes.

The statutory power given the clerk of the Superior Court to issue a commission to take proof touching the execution of a will executed in

another State does not restrict the right to *caveat* a will probated on a certified copy of the will filed in the clerk's office.

3. **Wills — Holograph — Safe-keeping — Beneficiary — Probate—Evidence—Deceased Persons—Statutes.**

Where the validity of a holograph will depends upon its having been left with the beneficiary for safe keeping [Revisal, 3127 (2)], his testimony thereof, after the death of the testator, is a transaction or communication of which he may not testify. Revisal, 1631.

4. **Wills — Probate — Clerks of Court — Certified Copies — Solemn Form—Lands—Cloud on Title—Equity.**

Where a will executed and probated in another State is relied upon to pass title to real property here, and a certified copy has been filed in the office of the Superior Court in the county wherein the lands lie, and it appears therefrom that the law of this State has not been sufficiently complied with, the heirs at law in possession may maintain a suit to declare the writing a cloud upon their title, whereon the beneficiary under the will may offer it for probate in solemn form, and the issues as to mental incapacity or other matters affecting its validity may be raised.

5. **Wills— Personalty— Title—Testator's Domicile—Caveat—Courts—Jurisdiction.**

A will, valid under the laws of the testator's domicile in another State, will pass title to the personal property situated here, though not in conformity with our statute; and a *caveat* should be filed, if the validity of the will be contested, in the courts of the testator's domicile.

BROWN, J., took no part in the decision of this case.

THIS is an appeal by plaintiffs from *Connor, J.*, sustaining a demurrer *ore tenus* to the complaint, April Term, 1918, of BEAUFORT.

Small, MacLean, Bragaw & Rodman for plaintiffs.
N. T. Green and F. S. Spruill for defendants.

CLARK, C. J. The plaintiffs are the sister and nephew and only heirs at law and next of kin of Sylvester Brown, who died in an insane asylum in Virginia, where he had been confined for several years. He died unmarried and without issue, 25 December, 1915, seized of real and personal property in Beaufort County. The administrator, who qualified in Beaufort, holds said personal estate for distribution upon determination of this action. The plaintiffs, as heirs at law, have divided the land by deed, duly registered.

On 20 January, 1916, the defendant S. D. Brown, a nonresident of this State, filed in the office of the Clerk of the Superior Court of Beaufort a certified copy of the last will and testament of Sylvester Brown, and of the probate thereof, in the Corporation Court of Norfolk, Va., claiming that by virtue thereof he is entitled to the real and personal property of the decedent lying in Beaufort County.

The complaint alleges that said paper-writing is not the last will and testament of Sylvester Brown, assigning mental incapacity and undue influence; and, further, that the certification of said paper-writing and of the proof and probate are void and of no effect, for that the laws of this State were not complied with, especially as to the said real estate, and that the only effect of filing such copy in the clerk's office is to cast a cloud upon plaintiffs' title to said real estate. The plaintiffs asked that they be declared the owners of said real and personal property of the decedent in Beaufort County, and that said paper-writing be declared not the last will and testament of Sylvester Brown and of no effect in this State.

The alleged will is a holograph and purports to bequeath and devise the testator's entire property, real and personal, after the payment of debts and burial expenses and reserving $100 for a monument, to S. D. Brown, his cousin.

The holograph will was without subscribing witnesses. It was not found among testator's valuable papers, but the devisee, S. D. Brown, produced it and testified that it was lodged with him for safe-keeping.

When a citizen of another State devises land in this State, such devise has no "validity or operation unless the will is executed according to the laws of this State, and that fact must appear affirmatively in the certified probate or exemplification of the will." Rev., 3133; *R. R. v. Mining Co.*, 113 N. C., 241; *Drake v. Merrill*, 47 N. C., 368.

The statute further provides that if it does not appear that the will was executed according to the laws of this State, the clerk shall have the power to issue a commission for taking proofs touching the execution of the will. The title to lands lying in this State can pass only by deed, or will, duly proven according to the laws of this State, or, in case of intestacy, by descent, under our statute. The will of a nonresident is not effective as to realty here unless executed according to the laws of this State, and this must affirmatively appear in the certified probate. Rev., 3133. While that section gives the clerk power to issue a commission to take proofs touching the execution of the will, this does not restrict the plaintiffs from *caveating* the same and requiring proof in solemn form, as in the case of the probate of a will had in this State in common form.

The testimony of S. D. Brown that the will was deposited with him for safe keeping is a most essential and indispensable fact in the execution of the will, and it was a transaction between him and the deceased, which he was incompetent to prove by Rev., 1631, and the demurrer should have been overruled. Rev., 3127 (2), requires that the holograph will must not only be proven "on the oath of at least three credible witnesses who state that they verily believe such will and every part thereof is in the handwriting of the person whose will it purports to be, and

whose name must be subscribed thereto, or inserted in some part thereof," but, further, "it must appear on the oath of some one of said witnesses, or some other credible person, that such will was found among the valuable papers and effects of the decedent, or was lodged in the hands of some person for safe keeping."

In *Cornelius v. Brawley,* 109 N. C., 542, the Court held that the widow and devisee was competent to prove that the script propounded was found among the valuable papers of the deceased, because this was not a transaction or communication between the deceased and the witness.

Alston v. Davis, 118 N. C., 213, also relied on by the defendant, does not hold that the devisee was competent to prove that the paper-writing was deposited with her, but the letter which was held to be a will, though found in her possession, stated on its face that it was deposited with her. It should not pass unmentioned that *Alston v. Davis, supra,* has been overruled by *Spencer v. Spencer,* 163 N. C., 88. *Vester v. Collins,* 101 N. C., 114, merely held that witnessing a will at the request of a testator is not a personal transaction with the deceased which the witness is incompetent to prove (Rev., sec. 1631); the attesting witness, though a beneficiary, being the witness of the law and not of the parties. Rev., 3120, while admitting such witness as competent, renders void the devise.

In *Cox v. Lumber Co.,* 124 N. C., 78, it was held that the executor and devisee in a will was competent to prove the existence of the will, its probate and registration, where destroyed by fire, and also its contents and his qualifications as executor, because these matters, all occurring after the death of the testator, were not transactions between him and the deceased. Under our decisions, the devisee might also prove the handwriting of a holograph will, or the signature of the testator, for these are not transactions between him and the deceased. *Sawyer v. Grandy,* 113 N. C., 42; *Ferebee v. Pritchard,* 112 N. C., 83; *Buie v. Scott,* 107 N. C., 181; *Hussey v. Kirkman,* 95 N. C., 63. So, also, a witness can prove the value of an article sold to defendant's intestate, but not that he made the sale (*March v. Verble,* 79 N. C., 19), or to prove any act of the deceased not had with himself. *S. v. Osborne,* 67 N. C., 259.

A witness would not be competent to prove in his own interest that he handed the deceased an account with the view of proving an implied acknowledgment. *Lane v. Rogers,* 113 N. C., 171. The defendant relies upon *Hampton v. Hardin,* 88 N. C., 592, where the Court held the devisee and executor competent to prove that the holograph will was deposited with her for safe keeping. We cannot hold that case well considered. It is in conflict with the terms of the statute which forbids a party or a person interested in the event of an action from testifying as to a transaction or communication with the deceased, and is opposed to the authorities above cited, and, indeed, to all the cases construing that provision of

what is now Rev., 1631. See citations to above cases in the Anno. Ed. and to *Bunn v. Todd,* 107 N. C., 266, where that section is analyzed. *Hampton v. Hardin* cannot be recognized as authority, and is overruled.

It appears upon the face of the probate that this will was not found among the valuable papers of the decedent, and that it was shown only by incompetent testimony—the oath of the beneficiary—that it had been deposited with him by the testator for safe keeping, and it is in evidence that the testator for many years had been, and at the time of his death was, confined in an insane asylum. Under these circumstances, it were better that the sanity of the alleged testator at the time of writing the will should have appeared in the probate. But the finding of a holograph will among the valuable papers of the deceased, or competent evidence of its deposit in other hands for safe keeping, is as essential a part of the proof of execution as that the paper-writing is in the handwriting of the alleged testator. It appears affirmatively here that the latter fact was not shown by evidence sufficient to prove its execution, and it is open to the plaintiffs to contest by this proceeding in the nature of a *caveat* the validity of the will on the ground of incompetency and undue influence, and to require due proof that it was delivered by the alleged testator to the beneficiary for safe keeping. In the absence of such proof, which is shown on the face of the probate, the will can have no effect in this State to control the devolution of real property, until proven in solemn form.

It was competent, therefore, for the heirs at law, who are in possession of the realty, to contest the validity of the will as a conveyance of the realty by asking that its record upon the defective probate, as certified, be declared a cloud upon their title. It will be open, however, to the executor and beneficiary of the will to offer it for probate in solemn form, in which case the due execution of the will and the question of the mental incapacity of the alleged testator and undue influence can be submitted to a jury. The decree in this case must set it aside as a cloud upon title, unless and until its validity is established in solemn form, as upon a *caveat.*

The whole subject has been so fully discussed in *Martin v. Stovall* (Tenn.), with elaborate citations in the notes, 48 L. R. A., 130, that further research is unnecessary. The authorities there cited hold that the decree of probate in the State where the testator is domiciled, if valid on its face, is effective as to personal property, though a few courts hold with *Bowen v. Johnson,* 5 R. I., 112, that the probate even as to personalty situated in another State is only *prima facie;* but the universal rule is that a will, to affect real estate, must conform as to its execution and proof to the law of the State where the land lies. The decisions to this effect are numerous and uniform. In *Rice v. Jones,* 4 Call (Va.), 89, it was held that, though a will had been declared void by a court in

North Carolina on account of the incapacity of the testator, or for any cause whatever, it could be probated in Virginia as to lands lying in that State.

The almost universal rule may thus be summed up: "Wills of personal property must be executed and probated according to the law of the domicile; but wills devising real estate must be executed and probated in compliance with the law of the State where the land lies."

In *Thrasher v. Ballard,* 33 W. Va., 285 (25 Am. St., 896), it is said: "Is this her valid will? Of this there is no evidence but this Virginia probate. That could have no force beyond Virginia. It could not operate to pass land in this State by establishing the due execution and validity of the will. 1 Minor's Institutes, 942, 943; *Sneed v. Ewing,* 5 J. J. Marsh, 460 (22 Am. Dec., 41); *Rice v. Jones,* 4 Call, 89; 1 Lomax Exr. (341), 555; *Bowen v. Johnson,* 5 R. I., 112 (73 Am. Dec., 49); *Ives v. Allyn,* 12 Vt., 589; *Kerr v. Moon,* 9 Wheat., 565. An executor of one State has no power of suit in another, without reprobate and qualification in such other State. *Kerr v. Moon, supra;* 1 Rob. New Pr., 161, 162. There the foreign probate is ineffectual. Why not here?" The Court then proceeds to consider the act of Congress touching the authentication of records, and says: "It has been held that probate orders do not fall, like judgments *inter partes* in ordinary suits, under this provision, but partake of the nature of *in rem* proceedings, binding only the property [*Bowen v. Johnson,* 5 R. I., 112 (73 Am. Dec., 49)], while the reverse view has also been held. *Balfour v. Chew,* 5 Martin (N. S.), 517. But, grant that probate sentences do fall under the act of Congress that gives the order such force as it has in Virginia; but the force it has there as to property is local and does not affect realty in another State, which is governed by the *lex loci rei sitæ.* In the words of Story on the Constitution, sec. 1313, 'The Constitution did not mean to confer a new power of jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory.'"

"The probate of a will in Pennsylvania gives it no validity whatever as to lands in Virginia or Ohio, unless the will is probated in such States, for it is a settled principle of law that the title and transfer of real property depend entirely upon the laws of the country where it is situated." *McCormick v. Sullivant,* 10 Wheat. (U. S.), 192. To the same purport are numerous cases in the notes to *Martin v. Stovall,* 48 L. R. A., 130, which *see.* In *Storage Co. v. Windsor,* 148 Ind., 682, it is said that, "When a foreign will has been admitted to probate, or may be offered for record, any person interested in the estate may contest such will within the time, in the manner, and for any cause prescribed by the laws of Indiana, in cases of domestic wills." In Gardner on Wills it is said: "The probate of a foreign will puts it on the same footing as a domestic

will, and renders it subject to contest in the same manner as a domestic will would be," citing *Dew v. Dew,* 23 Tex. Civ. App., 676.

As to realty, the law is thus summed up in 5 R. C. L., p. 1021, sec. 109: "A devise of land will not be effectual unless made and proved according to the *lex rei sitæ.* For this reason, the mere fact that a will has been admitted to probate in another State is not conclusive of its execution and proof in the manner required by the *lex rei sitæ. McCormick v. Sullivant,* 10 Wheat., 192; *Sneed v. Ewing,* 5 J. J. Marsh (Ky.), 460, and notes to 48 L. R. A., 133; 2 L. R. A. (N. S.), 428. Hence it is also that the validity of a will may be contested where the land is situated, although probated in another State, and notwithstanding the fact that the decree of another State probating the will is presumed to be correct, and it is further presumed that the court had jurisdiction. Some cases denied the effect on real estate on the ground that the court of original probate had no jurisdiction over the real estate in another State. Notes to 48 L. R. A., 136."

As to personalty, the early authorities were inclined to hold that the probate in another State was merely *prima facie* as to personalty in this State, though conclusive as to personalty in the State of domicile. But the present state of the law is thus summed up in 5 R. C. L., p. 1017, sec. 104: "It is a firmly established rule that, at common law and in the absence of a local statute to the contrary, the validity of a will of personal property, as to its form, the manner of its execution, and all other matters that relate to its legal existence, as distinguished from its essential validity, depends upon the law of the testator's domicile, irrespective of the law of the place where the will is executed, or of the place where the testator died, or of any other law whatsoever. . . . On the other hand, the formal validity of a will of real property depends upon the law of the State or country where the property is situated, irrespective of the law of the domicile of the testator or of the place where the will is executed."

As to personal property, as a general rule, it follows the person of the owner, and a will held valid in the State of his domicile transfers the title thereto, not only as to the personalty there, but as to personalty here, subject only to liability for debts due to the citizens of this State, and a will of personalty duly probated under the laws of the domicile will not be questioned here when the probate is valid on its face. In such case, those seeking to *caveat* the will on the ground of incompetency of the testator, or undue influence, or insufficiency of probate (not disclosed on its face), should proceed in the court of the domicile. Where, however, a provision in a will is contrary to our public policy, it is ineffective here. *Sorrey v. Bright,* 21 N. C., 113.

The demurrer should be sustained as to the personalty, in regard to

which the plaintiffs, if so advised, must proceed by a *caveat* in Virginia.

As to the realty, the demurrer should have been overruled, and the record of the will must be adjudged a cloud upon the title unless and until it has been established upon a probate in solemn form in this State, and to this extent the judgment below is reversed. The defendant will pay the costs of the appeal.

The costs of this Court will be paid by the defendant administrator of Sylvester Brown out of the funds in his hands.

Reversed.

CHARLES GRANT v. GRAHAM CHERO-COLA BOTTLING COMPANY.

(Filed 23 October, 1918.)

Vendor and Purchaser—Explosives—Soft Drinks—Bottling Under Pressure—Duty of Vendor—Burden of Proof—Reasonable Care—Instructions—Appeal and Error.

In an action by the purchaser to recover damages from the manufacturer of ginger ale in glass bottles filled under high gas pressure, it is *Held* that the manufacturer owes the dealer and his purchaser the duty to use reasonable precaution to see that the bottles may be safely handled in the ordinary manner, which is for the defendant to show; and a charge by the court that restricted its liability to the methods, etc., used by other like manufacturers, whose bottles had been shown to frequently explode, does not meet the requirement, and is reversible.

APPEAL by plaintiff from *Bond, J.*, at May Term, 1918, of ALAMANCE.

This was an action for damages sustained from an injury causing the loss of an eye. The plaintiff alleged that the defendant sold him bottles containing ginger ale, "which, on account of the excessive pressure of gas or by reason of some defect in the bottle, were dangerous, as aforesaid, and likely to explode and to cause injury to any person handling them or being near them."

The defendant's answer denied all negligence, and averred that in bottling the beverage sold to the plaintiff it had used high-class, standard materials and bottles; that it had a standard, up-to-date plant, equipped with modern machinery, and that it used tests and checks, to the end that excessive pressure should not be used. It pleaded contributory negligence on the part of plaintiff, in that plaintiff negligently submitted the bottled beverage to sudden and violent changes of temperature, which caused and was likely to cause the explosion of any bottle containing the carbonated beverage. The evidence was that the plaintiff was a merchant, and, having purchased a number of bottles of ginger ale from the defendant at its factory in Graham, N. C., had placed the same in

the refrigerator in his store. Shortly thereafter, going to the refrigerator to get a bottle for a customer, upon lifting the top and without touching any of the bottles, one of them burst, one of the pieces striking the plaintiff's left eye, destroying the same. There was evidence that defendant put up this and another carbonated beverage in his factory, and both prior and subsequent to the plaintiff's injury, bottles had burst, injuring numerous other persons under similar circumstances.

There was also evidence that these facts were known to the defendant, who also knew the manner in which the plaintiff used these bottles in his business, which was the usual and customary way in which merchants purchasing such merchandise used and handled it. The plaintiff complained that the defendant was negligent in bottling the beverage in such a manner; that it was dangerous to handle, and defendant had failed in his duty to plaintiff in selling him bottles which, on account of the excessive pressure of gas, or by reason of some defects of the bottles, were dangerous to be near or to handle.

The plaintiff introduced four or five witnesses, who testified to numerous explosions of both of the carbonated beverages bottled by the defendant at its plant. Some of these explosions were shown to have occurred in the bottling; others while the bottles were being crated and loaded; also upon the road, while being hauled for delivery, and also in the hands of customers besides the plaintiff, after delivery.

These explosions were not denied by the defendant, whose evidence showed explosions of these bottles put up by it, and also of other carbonated beverages put up by other plants. The defendant put on evidence that its plant at Graham was modern, up-to-date, and equipped with good machinery, and that it caused all bottles used in its business to be thoroughly and closely inspected.

The plaintiff excepted to the admission and rejection of testimony, the refusal of the judge to give certain prayers for instruction, and to certain paragraphs in the charge.

The jury having returned a verdict in favor of the defendant, the plaintiff appealed.

William P. Bynum, R. C. Strudwick, J. J. Henderson, and Thomas C. Carter for plaintiff.

Long & Long and Parker & Long for defendant.

CLARK, C. J. We need not consider more than one exception, since that goes to the whole trial, and, if erroneous, requires that the matter shall be again submitted to the jury under proper instructions. The court instructed the jury that if they found that "The defendant company used in its business appliances in approved and general use, with

competent and sufficient workmen, and put in such drink only that quantity of gas pressure generally and at all times put in similar drinks by reasonably prudent and careful bottlers putting up such drinks, and also used that degree of care in selecting and inspecting the bottles in question and in having them filled and closed that would have been used by a man of reasonable care and prudence, and in putting up such drink from start to finish, used that degree of care and prudence that would have been used by a man of reasonable care and prudence in handling and preparing the said article, then the defendant would not be guilty of negligence. If the injury was caused under the circumstances referred to above, after the defendant had used that degree of prudence and care, then the injury to plaintiff would have resulted from an accident and would not have been caused by the negligence of the defendant company, and in that event the jury should answer the first issue 'No.' "

This seems to have been the theory upon which the case was tried, and, with some changes of verbiage, is the subject of other exceptions. The change is so slight that it is not necessary to repeat the other charges excepted to.

All these charges embody the same idea, that the defendant is excused if it conducted its business in the same manner that other bottlers conducted theirs, although as a matter of fact all might be dangerous. They entirely fail to furnish any standard of the measure of duty required of a reasonable and prudent man under circumstances such as these. The practice of other bottlers is referred to as such standard, but those other bottlers were, on the evidence, careless and negligent as well as the defendant, as shown by the numerous explosions of their goods.

The plaintiff's counsel contend that the defendant's duty to the plaintiff and to the public cannot be measured by any such consideration; that the defendant owed to him the duty not to put into his hands as its customer a bottle charged with gas to that extent that it was dangerous to handle in the usual and customary method. The point is well taken.

There is no evidence of what a prudent and reasonable man would do in bottling such explosive material. The evidence that other plants put up bottles of such beverages which frequently exploded in like manner during the bottling, during transportation, and in the hands of customers, was not evidence that they were reasonable and prudent men, but, on the contrary, that they were as careless and negligent in their duty to the public and to their customers as this defendant. It does not exonerate this defendant that other establishments were careless and negligent. It is very certain that these establishments are not discharging their duty to the public and to their customers in putting out goods so prepared and bottled that there are numerous explosions, liable to cause injury at any time, and which not infrequently have done so, as in *Dail*

v. Taylor, 151 N. C., 287, and *Cashwell v. Bottling Works,* 174 N. C., 324.

If the charge of the court were correct, it would license the defendant and other dealers in these highly charge carbonated drinks to place upon the market highly dangerous merchandise, liable to explode and cause injury, such as the loss of plaintiff's eye, to all who handle these goods in the ordinary course of business, without any liability on the part of the manufacturers. The manufacturer is liable even to the final purchaser, though there was no contractual dealings between them. *Waters-Pierce Company v. De Selms,* 212 U. S., 159, 178, 179; *Wellington v. Downer Co.,* 104 Mass., 64; *Wiser v. Holzman,* 33 Wash, 87.

It is not incumbent upon the plaintiff to show what precautions the defendant should take; that duty devolved upon the defendant, who was liable for negligence in putting such dangerous goods upon the market without sufficient precaution to make them safe.

It may be that the defendant could have used wicker covering for the bottles, such as is used for champagne bottles, or wire-mesh cases, as is used for certain goods of explosive nature. These would not prevent explosions, but would prevent the fragments of the glass doing much damage; or the goods might be packed in sawdust, as is done with some goods, such as aerated water liable to explosion; or there might be some harmless ingredient put in the decoction to prevent sudden expansion, causing explosions—a device that is not unusual; or thicker bottles might be used, or there may be still other devices in this age, in which "men have sought out many inventions." Ecclesiastes, ch. vii, v. 28.

But what is the best protection is one which the defendant must ascertain and use. It is certainly no defense for the defendant, who has placed dangerous and highly explosive merchandise upon the market, which it knows has often exploded, to the injury of its customers and others, to claim that other vendors and manufacturers in their pursuit of gain have been as indifferent to the safety of their customers and the public as the defendant itself.

His Honor seems to have applied to this case the rule applicable to master and servant, where the servant sues for the master's negligence in failing to furnish a safe place to work and safe appliances, as in *Hicks v. Mfg. Co.,* 138 N. C., 319. But that is not the maximum. It is only the minimum requirement, even, in such cases. The master is liable if he does not use such improved appliances as are in general use. But the master would not be held protected if there are appliances which it can ascertain and use, and which would be a protection, simply because other employers have also been negligent. This defense was set up by the railroad companies in *Greenlee v. R. R.,* 122 N. C., 977; *Troxler v. R. R.,* 124 N. C., 191; and also by defendant in *Lloyd v. Hanes,* 126

N. C., 362, and in the cited cases to the above in the Anno. Ed., and clearly repudiated.

Such rule, if adopted, would discourage all improvements and appliances for the protection of life and limb. It would bring to a standstill all efforts for the better protection of mankind from preventable danger. The rule laid down in *Witsell v. R. R.*, 120 N. C., 563, quoted from Alexander Pope, while it does not require that any one should be "The first by whom the new is tried," certainly makes him liable if he is among "The last to lay the old aside."

As a matter of sound public policy and humanity, as well as of justice, the proposition that a negligent manufacturer putting goods on the market is not liable for failure to use safety preparations and appliances to guard against dangers that are known to him, simply because other manufacturers are no more careful than he, and are as reckless and regardless of the safety and of the rights of their customers, cannot be sustained.

"Safety first" for the public. If these goods are so inherently dangerous from their frequent explosion and liability to cause damage, as by putting out the eye of the plaintiff, that they cannot be made safe, then placing them upon the market is indictable, as well as makes the manufacturer and all vendors liable to actions for any damage accruing. *Ward v. Seafood Co.*, 171 N. C., 33.

Error.

A. V. JONES v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 23 October, 1918.)

1. **Verdicts—Interpretation—Instructions—Evidence.**

The verdict of the jury will be interpreted and allowed significance by reference to the testimony and charge of the court.

2. **Same—Railroads—Flying Switch—Independent Cause—Negligence.**

In an action by an employee of a railroad to recover damages for an injury received by him while engaged as brakeman on a freight train making a flying switch, there was evidence tending to show that the injury was caused by an unnecessary and sudden stop of the train; and to this latter the judge in his charge restricted the consideration of the jury on the question of the defendant's actionable negligence: *Held*, the verdict was not objectionable on the ground that the making of the flying switch was made an independent subject of such negligence and recovery allowed thereon, though an allegation in the complaint may have so regarded it.

3. **Railroads—Federal Employers' Liability Act—Statutes—Fellow-Servants—Negligence—Assumption of Risks.**

While at common law the negligence of a fellow-servant was classed among the risks assumed by an employee engaged in a common service,

and an engineer and brakeman on a railroad train come within this classification, the doctrine is controlled by the Federal Employer's Liability Act in cases coming within its intent and meaning; and while section 4 of the act in question recognizes the assumption of risks as a defense in certain instances, section 1 withdraws from the class of assumed risks cases of unusual and instant negligence of a fellow-servant, under circumstances which afford the injured employee no opportunity to know of the conditions or appreciate the attendant dangers, and therein the employer is responsible in damages for the negligence of the employee which caused the injury.

4. Same—Flying Switch—Independent Cause.

A brakeman on a freight train, under the Federal Employer's Liability Act, does not assume the risks of the sudden, unusual and unnecessary stopping of the train by the engineer thereof while making a flying switch which, without warning, caused the injury complained of in the action.

5. Railroads—Federal Employers' Liability Act—Instructions—Assumption of Risks—Appeal and Error—Harmless Error.

The general definition of the doctrine of assumption of risks, under the evidence in this case, that if the defendant railroad company was accustomed to make these flying switches and the plaintiff to assist in them, he assumed the risks of the incidental dangers, was correct, according to the Federal Employer's Liability Act, taken in connection with the instructions on the evidence as to risks not assumed by the employee, but, if erroneous, was without appreciable significance, and will not affect the result.

6. Damages—Instructions—Railroads—Federal Employers' Liability Act—Contributory Negligence.

Where the judge has correctly charged the jury, in the action of an employee of a railroad company to recover damages under the Federal Employer's Liability Act, as to the proportionate reduction of damages in case of contributory negligence, his use of the words, "full measure of damages," in this connection, to express the rule of adjustment in case there was no negligent default on plaintiff's part, is not error or prejudicial to the defendant.

7. Evidence—Pleadings—Extracts.

A party to an action may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry, without introducing qualifying or explanatory matter, it being open to the opposing party to introduce such qualifying matter if he so desires.

8. Same—Explanation—Contributory Negligence.

The defendant railroad company's actionable negligence being properly made to depend upon its engineer's suddenly and unexpectedly stopping its train in an unusual manner while making a flying switch, it is competent for the plaintiff to put in a clause of the defendant's answer relative to applying air brakes to slow down the train under the circumstances, and for the court to permit the defendant to introduce other portions of the answer, in explaining or qualifying the matter, and materially affecting the admissions, but allegations of contributory negligence, under the facts of this case, do not fall within the rule.

9. Appeal and Error—Evidence—Experts—Findings—Presumptions.

Where, under a general objection to his evidence, a witness has testified as an expert, and it appears from the record that he is fully qualified, it will be presumed, on appeal, that the preliminary finding of the trial judge that the witness was an expert had been made or that the appellant had waived it.

10. Same—Opinion Evidence—Record.

Where, in an action by an employee against a railroad company to recover damages for a personal injury, the proper stopping of a train by the use of air brakes, etc., is material to the inquiry, and it appears from the record on appeal that a witness was an experienced engineer, qualified by training and experience to express an opinion thereon by his use of engines and appliances exactly similar in structure and operation to that used in the instant case, and calculated to aid the jury to a correct conclusion: *Held*, his estimates and statements of the correct use of such appliances are as to facts relevant to the issue and properly received in evidence, whether in strictness expert evidence or not.

ACTION tried before *Ferguson, J.*, and a jury, at April Term, 1918, of WAKE.

The action is to recover damages for physical injuries to plaintiff, caused by the alleged negligence of defendant company; and the complaint, giving in each the true place and circumstances of the occurrence, states the grievances in two causes of action, in one of which there is direct averment that plaintiff was an employee on defendant's train, engaged at the time as a common carrier of interstate commerce, and a second cause of action without such averment.

Defendant having admitted in the answer that the train at the time was engaged in interstate commerce, the action was tried as one under the Federal Employer's Liability Act, and, on issues presenting the defenses and pleas, recognized by that statute.

On the hearing, the evidence on the part of plaintiff tended to show that on the occasion in question he was an employee on defendant's freight train running from Raleigh, N. C., towards Norfolk, Va., and at or near a station called Simms he was up on a box car, pursuant to orders, in the line of his duty and employment, engaged in making a flying or running switch, by means of which the car was to be placed on the siding at Simms; that the usual method is for the engine to draw the car to a speed required to run the same on the siding of its own momentum; the engine then slows down sufficiently to take up the slack and allow the coupling to be removed, when the engine speeds down the main line, allowing the car to run on the side-track as designed; that the proper way to do this is to slow down gradually, and there is a special appliance on the engine, called the Johnson bar, to enable him to do this without any threatening or unusual jolt; that the engine driving the car, having reached a speed, 10 or 12 miles an hour, "going very fast," by

plaintiff's own testimony, the engineer, by the application of direct air or the unusual manner of applying it, brought his engine to a sudden, unusual and unnecessary stop; that plaintiff, doing what he could to hold himself in place, was thereby thrown upon the track, in front of the car, and run over, causing the loss of one leg, seriously wounding another and painfully lacerating other portions of his person.

A rule offered by defendants, permitting flying switches to be made, contained, among other things, the admonition, "That great care must be exercised at all times in making any flying switch or in kicking cars."

In addition to the rule permitting these flying switches to be made, there was testimony on the part of defendant tending to show that this flying switch was made in the usual way, without causing any sudden or unusual jolt, and that plaintiff fell from the car by reason of his own inattention and negligence.

On issues submitted, the jury rendered the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to the occurrence of his injuries, as alleged in the answer? Answer: No.

3. Did the plaintiff assume the risk of the occurrence of the injuries which he sustained and here complained of? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $17,500.

Judgment on the verdict, and defendant excepted and appealed.

Douglass & Douglass and J. S. Manning for plaintiff.

R. N. Simms for defendant.

HOKE, J. It was chiefly objected to the validity of the trial that his Honor refused to hold as a matter of law that plaintiff was barred of recovery by reason of assumption of risk—this on the ground, first, that the making of a flying switch was one of the ordinary incidents of plaintiff's employment; second, that the engineer engaged in making such switch was a fellow-servant, and, on the facts in evidence, his negligence, if it should be established, should be properly classed as one of the assumed risks in the course of plaintiff's employment; but in our opinion neither position can be maintained. The first is closed to defendant by reason of the finding of the jury on the first issue. It is the accepted principle in our procedure that a verdict must be interpreted and allowed significance by proper reference to the testimony and the charge of the court. *Reynolds v. Express Co.*, 172 N. C., 487; *Donnell v. Greensboro*, 164 N. C., 330.

In the present case, while the complaint seems to specify the "making of the flying switch as a separate act of negligence, a perusal of the evi-

dence and the charge of the court will disclose that the making of the switch itself was not allowed as a ground of liability, but that the considerations and decisions of the first issue was restricted to the question whether there was negligence in making such switch by bringing the engine to an unnecessary and unusual stop," the language of his Honor's direct charge on the first issue being as follows:

"If you should find from the evidence, and by the greater weight of the evidence, that the engineer suddenly, by use of air brakes or any other appliance, suddenly and unnecessarily checked the speed of the engine in such a manner as to cause an unusual and unnecessary jar, sufficient to throw the plaintiff from the car, and he was thrown by reason of that from the car and run over and hurt, you will answer the first issue 'Yes'; but if you fail to so find, you will answer it 'No.'"

The verdict on the first issue, therefore, having eliminated "the making of a flying switch as a ground of liability," that fact as a separate circumstance is withdrawn from consideration also on the question of assumption of risk. And this, too, is the final answer to the second ground of defendant's objection; though, as argued, this presents other questions that it may be well to consider. At common law, or under the later decisions of the common-law courts, the negligence of a fellow-servant was classed among the risks assumed by an employee engaged in a common service, and on the facts of this record the engineer and brakeman are undoubtedly fellow-servants within the meaning of the principle. *New England R. R. v. Conroy*, 175 U. S., 323; *B. & O. R. R. v. Baugh*, 149 U. S., 369.

This cause, however, coming under the Federal Employer's Liability Act, it is fully established that the statute itself affords the exclusive and controlling rule of liability, and the question presented must be determined in accord with its provisions applicable and authoritative Federal decisions construing them. *Belch v. Seaboard Air Line*, at the present term, citing *Erie R. R. v. Winfield*, 244 U. S., 170; *N. Y. Central v. Winfield*, 244 U. S., 147; *St. Louis, &c., R. R. v. Hesterly, Admr.*, 228 U. S., 702; Second Employer's Liability Cases, 223 U. S., 1.

While the law in question clearly recognizes assumption of risk as a defense in certain instances, under section 4 such a position is absolutely inhibited in cases where the violation of a Federal statute, enacted for the protection of the employees, contributed to the injury or death of employee; and by correct deduction from the terms and meaning of section 1, making railroads engaged as common carriers of interstate commerce liable in damages for injuries or death caused by the negligence of their officers, agents, or employees, the negligence of fellow-servants is withdrawn from the class of assumed risks in cases of unusual and instant negligence and under circumstances which afforded the injured

employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must "come in time to be of use." 26 Cyc., p. 1202, citing 160 Ind., p. 583. This principle is very generally approved in the cases and text-books on the subject; and in authoritative Federal decisions construing the act in question, in reference to the negligence of fellow-servants and the incidental assumption of risks, it has been held that the effect of this first section is to place the conduct of fellow-servants on the same plane as the employer himself in such cases, and it is fully recognized that an employee does not assume the risks of his employer's negligence unless, as stated, he is given a fair opportunity to know and appreciate the risks to which he is thereby subjected. *Chesapeake & Ohio Ry. v. De Atly,* 241 U. S., 311; *Yazoo, &c., Ry. v. Wright,* 234 U. S., 376; *Seaboard Air Line v. Horton,* 233 U. S., 492; *Gila Valley, &c., Ry. v. Hall,* 232 U. S., 94; *Texas & Pacific Ry. v. Behymer,* 189 U. S., 905; 2 Employer's Liability Cases, 223 U. S., 1; *Grybowski v. Erie R. Co.,* 88 N. J. L., 1 (95 At., 764); Richey on Fed. Emp. Liability Act, sec. 59. In *Gila Valley Ry. v. Hall* the general position is stated as follows:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as they are not attributable to the employer's negligence; but the employee has the right to assume that his employer has exercised proper care with respect to providing safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it.

"In order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it."

In *Chesapeake & Ohio Ry. v. Atley,* where an employee was injured in the endeavor to board a moving train in the course of his employment, and was injured by the unusual speed of the engine, it was held as follows:

"The Employer's Liability Act abrogated the common-law fellow-servant rule by placing negligence of a coemployee upon the same basis as negligence of the employer.

"In saving the defense of assumption of risk in cases other than those where the carrier's violation of a statute enacted for the safety of em-

ployees contributed to the injury or death, the Employer's Liability Act places a coemployee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk.

"A railroad employee, having voluntarily entered an employment requiring him on proper occasions to board a moving train, assumes the risk normally incident thereto, other than such risk as may arise from the failure of the engineer to use due care to operate the train at a moderate rate of speed, so as to enable his coemployee to board it without undue peril.

"Such an employee may presume the engineer will exercise due care for his safety, and does not assume the risk attributable to operation at unduly high speed until made aware of danger, unless the undue speed and consequent danger are so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger.

"An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

It will be noted that this was an action under the Employers' Liability Statute and bears with much directness on the facts of the present case. And *Yazoo, etc., Ry. v. Wright* was also a case under the Employers' Liability Act and holding that no case of assumption of risk was presented when an employee was injured by negligence of the master or fellow-servant and the circumstances gave no opportunity to know the danger "in time to be of use."

In *Ry. v. Behmyer, supra*, a case where an employee had recovered for injuries attributable to an unusual and sudden jerking of a freight train, *Associate Justice Holmes*, delivering the opinion in affirmance of the judgment below, said: "No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of, yet it can be avoided if necessary, and when the particular and known conditions of the train makes a sudden bump obviously dangerous to those known to be on the top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as it did stop, the risk of it was not assumed by plaintiff." Citing *Tex. Pac. Ry. v. Archibald*, 170 U. S., 665-672.

The case *Boldt v. Ry.*, 245 U. S., 442, a decision very much relied on by defendant, does not antagonize the position approved and applied in

the cases cited. In *Boldt's case,* "The intestate of plaintiff, while between cars in a freight yard helping to repair a faulty coupler, was killed by the impact of a string of cars moving by gravity under the control of a brakeman. It was contended that the brakeman negligently permitted the moving cars to strike with too great violence, and that the company failed to promulgate adequate rules on the subject, with evidence to support both claims." There was also evidence tending to show that it was usual to allow the moving cars to strike others that were stationary with force sufficient to make the coupling, etc. On the trial below there was verdict for the company, and on writ of error by plaintiff the single exception insisted on was the refusal of the trial court to give the following instruction asked by him: "The risk the employee now assumes since the passing of the Federal Employers' Liability Act is the ordinary dangers incident to his employment which does not now include the assumption of risks incident to the negligence of the owner's officers, agents and employees."

In overruling the exceptions, the Court, adhering to its former position that the act had the effect of placing the negligence of a fellow-servant in the same category as that of the employer's, held that the prayer for instruction was too broadly stated, as the employee, as a rule, assumed the "extraordinary risks caused by the master's negligence where they are obvious or fully known and appreciated by him"; but, as will be readily seen, the case gives no support to the position that the employee assumes the risks incident to an act of negligence by the employer or fellow-servant where no opportunity was afforded to know or appreciate the conditions or its attendant dangers.

This being, in our opinion, the correct principles applicable, and the jury, under the charge of the court, having, as stated, established by their verdict on the first and second issues that plaintiff was thrown from the car and run over and injured solely by reason of the sudden, unusual and unnecessary manner in which the engine and car were stopped by the engineer, an instant act of negligence on his part, we think defendant's motion was properly disallowed and his Honor correctly ruled that, on the facts so established, the defense of assumption of risk was not available to defendant.

It was further objected that his Honor gave an erroneous definition of assumption of risk. The court charged the jury that if the company was accustomed to make these flying switches and plaintiff to assist in them, he assumed the risk of the incidental dangers, and his general definition of the principle seems to be in accord with the decisions on the subject. But having restricted the fact of liability on the first issue to the single question whether the engineer made the flying switch negligently by bringing his engine to an unnecessary and unusual and sud-

den stop, and this having been determined in plaintiff's favor, the court, under the authorities, was justified in the ruling that there could be no assumption of risk, and his definition was without appreciable significance, and should not be allowed to affect the result.

It was further insisted that his Honor committed prejudicial error in his charge on the question of damages by saying, in certain aspects, the plaintiff should recover the "full measure of damages," but this exception is without merit. It was used in connection with his Honor's instructions in reference to the effect of plaintiff's contributory negligence on the amount of damages. Having charged that the damages must be proportionately reduced in case there was contributory negligence on part of plaintiff, he used the term "full measure" to express correctly the rule of adjustment in case there was no negligent default on plaintiff's part; and it has been held that the term in any event does not always constitute reversible error. *Texas Ry. v. McCarty,* 49 Tex. Civ. App., 532.

Defendant excepted further to the rulings of the court on questions of evidence. First, that his Honor allowed plaintiff to put in evidence a separate clause of section 5 of the answer as follows: "That in order to disconnect the said moving engine and car, it was necessary, as a part of said operation, to apply air to the engine so as to slow the same down." And further, that he refused to permit defendant to introduce other portions of said answer materially affecting said admissions.

In this connection, his Honor offered to allow defendant, in reply, to introduce the accompanying statements of this paragraph as follows: "That, pursuant to said purpose, the said engine and cars were proceeding along the track and in the usual and customary manner, and the said engine was slowed down and the car uncoupled from said engine." The defendant declined, and in addition offered in evidence the entire remaining portion of the paragraph and excepted to the ruling excluding the additional statement.

It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that in such case it is open to the opposing party to introduce such qualifying matter if he so desires. *Wade v. Contracting Co.,* 149 N. C., 177; *Sawyer v. R. R.,* 145 N. C., 24; *Lewis v. R. R.,* 132 N. C., 382.

A correct application of the principle is in full support of his Honor's ruling on both questions. The part of paragraph 5 admitted was of a distinct and separate fact relevant to the issue. His Honor offered to allow defendant to introduce in reply any accompanying allegation

which could properly be said to qualify or explain the fact, and the additional allegations of the answer insisted on by appellant averring contributory negligence by plaintiff were in no sense qualifying or explanatory of the fact admitted, and were therefore properly excluded.

It was contended further for error that the court, over the defendant's objection, allowed in evidence the testimony of the witness S. C. Green, a locomotive engineer, as to the customary and proper manner of making these flying switches and the use of the appliances on the engine provided for the purpose.

On the argument before us, the objection was urged chiefly on the ground that there had been no preliminary finding by the court that the witness was an expert, but no such objection was made on the trial, nor was the court asked or required to make a finding on the preliminary question. The record shows that there was only a general objection to the evidence of the witness; and this being true, assuming that the testimony of the witness was opinion evidence and the record showing that the witness was fully qualified as an expert, the presumption is either that there was a preliminary finding by the court or that the same had been waived. *Lumber Co. v. R. R.*, 151 N. C., 217-220, citing *Britt v. R. R.*, 148 N. C., 37; *Summerlin v. R. R.*, 133 N. C., 550.

Apart from this, and under our decisions, the witness being, as the record shows, qualified by training and experience to express an opinion calculated to aid the jury to a correct conclusion, and speaking to the operation and use of engines and appliances exactly similar in structure and operation to that used in the instant case, his estimates and statement of the correct use of such appliances were facts relevant to the issue and properly received in evidence whether in strictness expert evidence or not. *Tire Setter Co. v. Whitehurst*, 148 N. C., 446; *Britt v. R. R.*, 148 N. C., 37.

There were other exceptions noted, but while they have all been duly considered, being without appreciable bearing or significance on the results of the trial, they are not further adverted to.

We find no error in the record and the judgment for plaintiff is affirmed.

No error.

ATLANTIC TRUST AND BANKING COMPANY v.
MARY FOY STONE ET AL.

(Filed 23 October, 1918.)

1. Wills—Widow's Dissent—Insolvent Estate.

The failure of a widow to dissent from her husband's will within six months does not prevent her from claiming dower, or its equivalent, in the lands devised when it appears that the estate is insolvent.

2. Judgments—Estoppel—Dower—Statutes—Executors and Administrators—Sales of Land to Make Assets.

The statute, Revisal, sec. 3082, gives the right of dower to the widow of the deceased free from the payment of his debts, etc., and where she has not dissented from the will of her husband, but has been made a party to proceedings brought by the administrator, C. T. A., to sell lands to pay debts due by the estate, she is not estopped by the final judgment therein to claim her right of dower from the insolvent estate, as such right was not at issue or properly included in the administrator's proceedings; and this applies to the net proceeds from a sale thereunder of part of the lands as well as to an unsold remainder thereof. The conflicting decisions as to estoppel by judgment reconciled by ALLEN, J.

WALKER, J., dissents.

APPEAL by both parties from *Lyon, J.*, at the April Term, 1918, of NEW HANOVER.

This is a petition for dower filed in a special proceeding to sell land for assets.

B. O. Stone died in the county of New Hanover leaving a will in which he devised and bequeathed all of his property to his wife, Mary Foy Stone, and his children, and the Atlantic Trust Company qualified as his administrator with the will annexed. Thereafter the administrator filed his petition to sell the lands of the testator for assets and the widow of the said B. O. Stone and his children were parties to said proceeding.

Orders of sale were made in said proceeding and a part of the lands sold and the sales confirmed, and the proceeds of the sales being now in the hands of the administrator and other parts of the lands remain unsold. Nothing was said in said proceeding of the right of the widow to dower.

When the testator first died it was believed that his estate was solvent and that there would be a large amount after the payment of debts, belonging to the widow and her children, and for this reason and because she was advised by a reputable attorney that her failure to dissent from the will within six months would prevent her claiming dower she made no claim thereto until January, 1917, more than a year after the petition to sell lands for assets was filed, and she then filed her petition in

the cause demanding the allotment of dower. The estate of the said B. O. Stone is insolvent.

His Honor held, and so adjudged, that the widow was not entitled to dower or other interest in the lands that had been sold or in the proceeds thereof, and that she was entitled to dower in the lands remaining unsold, and both the widow and the trust company excepted and appealed—the widow upon the ground that she was entitled to dower in the proceeds of the sale and the trust company upon the ground that she was not entitled to dower in the lands remaining unsold, claiming that she was estopped by the orders and decrees in the special proceeding to claim dower either in the proceeds of the sale or in the lands remaining unsold.

Rountree & Davis for trust company.
E. K. Bryan for widow.

ALLEN, J. It is conceded by counsel for the trust company that the failure of the widow to dissent from her husband's will within six months does not prevent her from claiming dower, or its equivalent, in the land devised to her, and this position is fully sustained by the authorities. *Simonton v. Houston,* 78 N. C., 408; *Lee v. Giles,* 161 N. C., 545. The trust company does, however, contend that the orders and judgments in the special proceedings to sell land for assets, to which the widow was a party, are valid, and that they estop her from claiming dower.

Assuming the orders and judgments to be regular, it cannot be questioned that they estop the widow to claim dower in the land which has been sold and the sales confirmed, and that they fully protect the purchasers, but do they go further and prevent the widow from claiming the value of her dower in the proceeds of the sale now in the hands of the trust company, the administrator, and dower in the lands remaining unsold? This depends upon whether the right to dower was adjudicated and denied in the special proceeding or necessarily involved therein.

We find it stated in some of the authorities that judgments estop not only as to the matters actually litigated, but also as to those that might have been litigated, and in others that they estop only as to the matters in issue and determined, but this conflict of opinion is apparent, not real, the difference in statement of the legal principle being due to the difference in the several actions, the first being applicable when the second action is on the same claim or demand, and the other when it is on a different claim or demand.

The distinction is stated very clearly in *Cromwell v. County of Sac,* 94 U. S., 351, approved in *Clothing Co. v. Hay,* 163 N. C., 497, as fol-

lows: "The language, therefore, which is so often used, that a judgment estopps not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all causes, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Applying this principle, the conclusion follows that the widow is not barred of her right to dower by the former proceedings, because this right was not put in issue or litigated, and the second proceeding, a petition for dower, is not on the same claim or demand as the first, a petition to sell lands for assets.

The case of *Latta v. Russ*, 53 N. C., 111, is decided upon this principle. There a petition was filed to sell land for assets, in which the several debts were stated and decrees of sale and confirmation entered, the lands sold and the proceeds applied to the payment of debts. The administrator then died and an action was commenced for an accounting of the estate, in which a referee found that, allowing credits for vouchers, there remained in the hands of the administrator $882.22, but if the debts be allowed as stated in the decrees, there would be in hand only $252.45.

The judge of the Superior Court held that the decrees were binding on the parties as to the amount of the debts as stated in the petition, but this was reversed on appeal, the court saying, "We do not concur with his Honor in the view taken by him of the question reserved, in respect to the effect of the decree giving the administratrix license to sell the land. That decree was an adjudication that it was necessary to sell and is conclusive in favor of the title acquired by the purchaser, but it is not conclusive of the question or debt or no debt as against or in favor of creditors, or as against or in favor of the heirs." This excerpt was quoted and applied in *Austin v. Austin*, 132 N. C., 265.

If, then, the widow is not barred of her right to dower, why should not its value be ascertained and paid out of the proceeds of sale, which

represent the interest of the heirs and devisees and of the widow? In other words, the trust company has now in hand as administrator, and is seeking to apply to the payment of debts, the value of the widow's dower, when the statute (Revisal, sec. 3082) says, "The dower or right of dower of a widow and such lands as may be devised to her by his will, if such lands do not exceed the quantity she would be entitled to by right of dower, although she has not dissented from such will, shall not be subject to the payment of debts due from the estate of her husband during the term of her life."

She is not asking to take anything from the creditors but for her own, which the law says "shall not be subject to the payment of debts." We are, therefore, of opinion the widow is entitled to dower in the proceeds of sale and, by the same reasoning, in the land unsold. She must, however, be content with the ascertainment of its value as to the land sold out of the net proceeds, because, having consented to the sale and conversion, she is justly chargeable with the ratable part of the expense.

We find no evidence as to the age of the widow, and the finding in this respect is

Reversed.

WALKER, J., dissenting: I am unable to concur with the majority in the opinion that Mrs. Stone is not estopped by the judgment directing a sale of the land, at least to the extent that it may be required to pay her husband's debts. It was surely adjudicated in this proceeding by solemn judgment, which she had the clear right and opportunity to prevent if it illegally deprived her of her right of dower, that the lands should be sold to pay the debts and to the extent that it was necessary to sell for this purpose she is estopped by her failure to assert that right in due and proper time. She failed to do so, and now proposes to controvert what was decided and to claim her dower before the debts are paid. She is disputing now the very question then decided, that the land should be sold and out of the proceeds of sale that the debts be paid. Is is an estoppel by record, or *res judicata,* within the principle stated in *Cromwell v. County of Sac,* 94 U. S., 351, and assuredly is so under the case of *Armfield v. Moore,* 44 N. C., 157, where land was partitioned, and it turned out after judgment that one of the tenants in common owned one-third of the land in another's right (*en autre droit*). This Court held that the judgment estopped as to this right, as it should have been asserted and passed upon before judgment entered. The Court said that "when a fact is decided in a court of record, neither of the parties shall be allowed to call it in question and have it tried again at any time thereafter so long as the judgment or decree stands unreversed." And again: "In a civil suit, if a fact be agreed on by the

parties, or be found by a verdict, and the court acts thereon and pronounces a judgment or decree, neither party can be afterwards heard to gainsay that fact so long as the judgment or decree stands unreversed. An allegation of the discovery of important evidence after the admission or trial, or a suggestion that the party made the admission of record under a mistake as to his rights, cannot be listened to without upsetting the whole administration of the law as a system and reducing it to a mere arbitrary and despotic proceeding, by which the court in each case, according to its view of the circumstances, may see fit to decide in the one way or the other."

There is no suggestion of fraud or mistake in this case and no other equitable claimant. It is a proceeding at law, and in permitting Mrs. Stone to have dower in the land before the debts are fully paid we are simply, in my opinion, reversing what was decided by the Court when, upon consideration, it decreed a sale to pay debts. Whether she can have dower if there is more than enough land to pay the debts and proper costs and expenses, or whether, upon the facts, she is entitled to dower at all, I need not say.

The case of *Latta v. Russ,* 53 N. C., 111, is not an authority favoring the conclusion of the Court, but, I think, is rather the other way. The right of the widow was put in issue because the court ordered all of the land to be sold if necessary to pay debts, and that, of course, included the dower, if any such right or estate existed. All interests were directed to be sold, as nothing was excepted. In *Latta v. Russ,* this Court simply held that there was no estoppel as to the amount of the debts, for that was not in issue, and this was correct; but it did not say there was no estoppel as to all rights that were included in the order of sale. The court decided that there were debts without it being necessary to say how many or how much indebtedness. It did decide that "it was necessary to sell," and as to that part of the decree, said the court, there was an adjudication which estopped. That is our case.

O. L. JOYNER ET AL. v. THE REFLECTOR COMPANY AND M. H. HUX.

(Filed 23 October, 1918.)

1. Appeal and Error—Fragmentary Appeal.

An appeal from an order disallowing a preference claimed in the funds in a receiver's hands over other claims filed, and retaining the cause for further orders for its distribution, is fragmentary, and the exceptions will be reserved to be passed upon on appeal from final judgment.

2. Corporations—Mortgages—Torts—Preferences—Statutes.

To secure a preference over a mortgage given by a corporation for damages arising in tort, etc., Revisal, sec. 1130, the action should be commenced within sixty days after the registration of the mortgage.

3. Same—Liens—Judgments—Execution—Receivers—Distribution.

Revisal, sec. 1131, confers no lien upon the property of a corporation in favor of one injured by its tort, but eliminates the corporate mortgage in favor of a judgment therefor, duly commenced, which the judgment debtor may collect by execution, except when a receiver has been previously appointed, and then he is entitled to his pro rata distribution of the funds.

4. Subrogation—Bills and Notes—Endorsers—Mortgages—Evidence—Questions for Jury—Trials.

The endorsers on a note of a corporation secured by mortgage on its property are not entitled to subrogation, either legal or conventional, when it is ascertained that the note was paid by the corporation, and not the endorsers, and where there is evidence that the latter had paid it, the question should be submitted to the jury.

5. Subrogation—Legal—Conventional.

As distinguished from legal subrogation, conventional subrogation is founded on the agreement of the parties in the nature of an equitable assignment, while the former exists where one who has an interest to protect, or is secondarily liable, makes payment of the obligation.

6. Corporations—Torts—Mortgages—Purchase Price—Statutes.

A mortgage of a corporation to secure purchase money has priority over a judgment against it arising in tort. *Walker v. L. Co.*, 174 N. C., 60, cited and applied.

APPEAL by Hux, intervenor, from *Allen, J.*, at the May Term, 1918, of PITT.

This action was brought by O. L. Joyner v. The Reflector Company, a corporation, on 24 November, 1916, asking that a receiver be appointed to take charge of the Reflector Company, which was done, L. G. Cooper being appointed receiver. The property of the Reflector Company was sold by said receiver on 19 February, 1917, by virtue of an order of court. H. M. Hux, who had obtained judgment against the Reflector Company for $4,000 for tort committed 12 September, 1912, filed a claim with said receiver for and on account of said judgment, asking that his claim be paid ahead of other claims, or that he be given a preference on account of section 1131 of the Revisal. The receiver ruled against the said Hux and he appealed to the Superior Court and by proper order was allowed to intervene and become a party so as to protect his rights. The receiver held that notes secured in the deed of trust to S. J. Everett dated 25 September, 1912, the total amount of the notes being $5,000, but which had been paid down by the Reflector Company to $3,300, had a preference over other claims. After the said H. M. Hux appealed, the Greenville Banking and Trust Company, the

National Bank of Greenville, and the Farmers Bank, D. J. Whichard, S. J. Everett, R. J. Cobb, F. M. Wooten, C. O'H. Laughinghouse, C. W. Wilson, B. B. Sugg, W. E. Proctor, J. J. Elks, R. C. Flanagan, and H. A. White, who, with the plaintiff Joyner, are the creditors in said deed of trust and the indorsers of said notes, all petitioned to be made parties plaintiff, alleging that at the time of the execution of the deed of trust to S. J. Everett, there was an understanding between the Reflector Company and the endorsers on the notes secured in the deed of trust to S. J. Everett that the notes to the Mergenthaler Linotype Company and the notes to the Miehle Printing Press and Manufacturing Company should be taken up out of the fund obtained from the deed of trust to S. J. Everett and held by S. J. Everett as trustee for said sureties. This was denied by the said H. M. Hux.

At the January Term, 1918, of the Superior Court, the judge presiding made an order of compulsory reference in the cause to C. C. Pierce to find the facts in the matter and report to the court, all parties excepting to said order and reserving their rights to a jury trial. The matter was heard by C. C. Pierce and report made. The intervenor, H. M. Hux, excepted to the report, and the same came on to be tried at the May Term, 1918, of the Superior Court.

The notes to the Mergenthaler Company and to the Miehle Company were apparently given for the purchase money of certain machines and were secured by mortgages on the machines, the mortgage to the Mergenthaler Company being executed by D. J. Whichard, who did business in the name of the Reflector Company before its incorporation, and the mortgage to the Miehle Company being executed by the Reflector Company, incorporated.

There was evidence that at the time of the execution of the deed of trust of 25 September, 1912, that the notes and mortgages to Mergenthaler and Miehle companies were paid and canceled by the Reflector Company, and also evidence that they were delivered to Everett, trustee, to be held as security for the creditors in the deed of trust, or if payment was made it was by the creditors.

The following verdict was returned by the jury:

1. What was the value of the Mergenthaler Linotype machine on 19 February, 1917, the day of the sale? Answer: "$950."

2. What was the value of the Miehle printing press on 19 February, 1917, the day of the sale? Answer: "$1,650."

3. Were notes of the Reflector Company to the Mergenthaler Linotype Company paid by the Reflector Company and discharged, as alleged by the intervenor? Answer: "No."

4. Were notes of the Reflector Company to the Mergenthaler Linotype Company and mortgage assigned to S. J. Everett as trustee? Answer: "Yes."

5. Were the notes of the Reflector Company to the Miehle Printing Press and Manufacturing Company paid, satisfied and discharged, as alleged by the intervenor? Answer: "No."

His Honor instructed the jury to answer the third and fifth issues "No" and the fourth issue "Yes" if they believed the evidence, and the intervenor Hux excepted.

An order was entered upon the report of the referee and the verdict declaring that Hux was not entitled to a preference over the mortgage creditors and retaining the cause for further order of distribution of the fund, and Hux excepted and appealed.

F. M. Wooten and Harry Skinner for appellees.
Julius Brown and Ward & Grimes for intervenor.

ALLEN, J. This appeal is premature and must be dismissed, because the order appealed from disposes of only one question of many arising upon the record (*Hinton v. Ins. Co.,* 116 N. C., 222; *Richardson v. Express Co.,* 151 N. C., 61); but upon dismissal, the exceptions, duly taken, are preserved to be passed on upon appeal from the final judgment. *Gray v. James,* 147 N. C., 141.

We have, however, examined the record at the request of both parties, and as another appeal may be avoided by expressing an opinion on the principal questions in controversy, have concluded to do so.

(1) We agree with his Honor in the conclusion that Hux has no preference. He cannot claim a preference under section 1130 of the Revisal because he did not commence an action to enforce his claim within sixty days after the registration of the deed of trust, and section 1131 confers no lien or priority. It simply wipes out the mortgage as against a judgment for tort, so that the judgment creditor may proceed to collect his judgment as if there was no mortgage, by execution if the property is not in the hands of a receiver, or by pro rating with the mortgage creditors if a receiver has taken charge. *Clement v. King,* 152 N. C., 460, and cases cited.

(2) We are of opinion his Honor was in error in directing a verdict on the third, fourth, and fifth issues, as there is evidence that the Mergenthaler and Miehle notes and mortgages were paid by the Reflector Company, the debtor; and if this should be found to be true, there would be no ground for subrogation, legal or conventional, and the distribution of the funds in the hands of the receiver would have to be made without reference to these mortgages. See *Pub. Co. v. Barber,* 165 N. C., 488, for a discussion of the difference between legal and conventional subrogation and the effect of payment by a volunteer.

If these notes and mortgages were not paid by the Reflector Company

there should be specific answers to the following questions as to the Mergenthaler notes and mortgages, and the same as to the Miehle notes and mortgages:

1. Were the Mergenthaler notes and mortgage executed before or after the incorporation of the Reflector Company? It would seem that they were executed before, but it is stated in the record as an agreed fact that the company was incorporated 28 May, 1910, and that the Mergenthaler machine was bought 7 June, 1910.

2. If executed before, did the corporation assume the payment of the debt, and was any other paper executed therefor, and if so, what paper?

3. Were these notes and mortgage executed for the purchase money of the linotype machine sold by the receiver?

4. Was it the understanding and agreement when these notes and mortgages were paid in bank they should be kept alive and held by Everett, trustee, for the benefit of the creditors in the deed in trust?

5. If not, were these notes and mortgage paid by the creditors secured in the deed in trust for the purpose of relieving the property in the deed in trust of the lien of the mortgage?

If the fourth question should be answered "Yes," the creditors in the deed of trust would be entitled to the benefit of legal subrogation; and if the fifth "Yes," to conventional subrogation to the extent of the value of the property conveyed at the time of the sale by the receiver; and if the mortgage was executed before the Reflector Company was incorporated, it would have priority over the judgment in favor of Hux, because section 1131 only applies to mortgages executed by corporations, and the same result would follow if the mortgage was executed by the corporation to secure the purchase money under the authority of *Walker v. L. Co.*, 170 N. C., 460.

On the other hand, if the debt secured by the mortgage was paid by the Reflector Company, or if the third and fourth questions should be answered "No," there would be no subrogation, or if the facts are such as to entitle the creditors to subrogation, there would be no preference or priority in their favor if the mortgage was executed by the corporation and not to secure the purchase money.

Legal subrogation is based upon payment and exists where one who has an interest to protect or is secondarily liable makes payment, while conventional subrogation, so named from the convention or agreement of the civil law, is founded upon the agreement of the parties, which really amounts to an equitable assignment. *Liles v. Rogers*, 113 N. C., 197; *Bank v. Bank*, 158 N. C., 250; *Pub. Co. v. Barber*, 165 N. C., 488.

We have expressed an opinion on the questions discussed in the briefs because the fund in the hands of the receiver, not sufficient to pay the creditors, is in danger of being exhausted in litigation, and it seemed

we might enable the parties to settle their controversy without further appeal; but fragmentary appeals must not be encouraged, as they tend to prolong litigation and to increase cost and expense, and those who resort to them must understand that they need not expect anything except a dismissal with costs.

We suggest that the findings of the jury on the third, fourth, and fifth issues be set aside by consent and the questions involved be tried again on account of the erroneous instruction heretofore referred to, which enters into the findings, and would avail the parties on an appeal from the final judgment.

Appeal dismissed.

J. O. PLUMMER v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 23 October, 1918.)

1. **Principal and Agent—Declarations—Evidence—Carriers of Passengers—Brakeman.**

   In an action for damages for sickness caused by the car of defendant railroad company not being properly heated in cold weather, declarations of a brakeman to the plaintiff, before entering the car as a passenger, as to the breaking of the heating pipe and the cold condition of the car, are incompetent as declarations of an agent which bind his principal.

2. **Evidence—Opinion—Expert— Witnesses— Issues of Fact— Questions for Jury—Appeal and Error.**

   An expert opinion should be based upon the assumption of the finding of the jury, and a medical expert opinion based only on a statement of the occurrences as made to him by his patient is an invasion of the province of the jury to find the facts.

ACTION tried before *Stacy, J.*, at January Term, 1918, of WAKE.

From verdict and judgment for plaintiff defendant appealed.

Douglass & Douglass for plaintiff.
Murray Allen for defendant.

BROWN, J. Plaintiff sues to recover damages for an alleged illness caused by tonsilitis claimed to have been caused by traveling in a "cold passenger car" of defendants from Raleigh to Norlina.

The plaintiff was permitted to testify to a conversation with the porter as to the breaking of a steam pipe before plaintiff boarded the train, and in which the porter said "it is pretty tough, but you know I am employed by the railroad and I dare not bother, because my job is at stake."

It is well settled that the declarations of an agent not a part of the *res gestæ* and made after the transaction are incompetent. *Lyman v. R. R.,* 132 N. C., 724; *Southerland v. R. R.,* 106 N. C., 105; *Barnes v. R. R.,* 161 N. C., 581.

In this last case it is held that declarations of a station hand as to the defective condition of a water tank are not admissible in an action for a fireman's death from the defective water tank.

Dr. L. E. McCauley, witness for plaintiff, was permitted to give a detailed history of plaintiff's case as related to him by plaintiff. This witness was permitted to testify as follows:

Q. State to the jury, in your opinion, from what Dr. Plummer described to you, whether that condition could have been produced by exposure on that train?

Objection by defendant.

A. It is perfectly possible from the history that he gave me, and highly probable——

Defendant moves to strike out answer; overruled; exception.

The objection should have been sustained. The form of the question permits the witness to decide the very question submitted to the jury upon the statement which the witness had received from the plaintiff. It permits the expression of an expert opinion based upon facts related by plaintiff to the witness, although the truth of the facts has not been passed upon by the jury. The opinion of an expert cannot be based upon an assumption of the truth of facts related to him either by a witness or any third person. The expert opinion must be based upon the assumption that the fact submitted to the expert has been established by the verdict of the jury. *S. v. Bowman,* 78 N. C., 509.

There are other assignments of error which we deem it unnecessary to discuss as they may not arise on another trial.

New trial.

RALEIGH IMPROVEMENT COMPANY v. W. J. ANDREWS ET AL., EXECUTORS OF A. B. ANDREWS, DECEASED.

(Filed 23 October, 1918.)

1. Contracts, Written — Parol Agreements — Merger — Corporations—Subscriptions to Stock.

All prior and contemporaneous verbal agreements to a written subscription to take shares of stock in a proposed corporation merge in the writing.

2. Same—Contradiction—Statute of Frauds.

A written subscription to take shares of stock in a proposed corporation by paying a certain amount in cash and the balance when called for by its

board of directors cannot be varied by evidence of a parol agreement that the subscriber only obligated himself, in the event the full amount required for the enterprise had been raised, as such would contradict or vary the written instrument.

3. Corporations—Subscriptions to Stock—Abandonment—Equity.

The mere fact, alone, that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription to its shares upon call of the directors, according to his agreement, and gives the court no equitable jurisdiction to interfere and prevent further calls upon the stockholders, unless it be made to appear that they have equally contributed to the common object and the rights of others are not impaired.

ACTION tried before *Stacy, J.*, at January Term, 1918, of WAKE, upon these issues:

1. Was the subscription of A. B. Andrews, deceased, to plaintiff Improvement Company made with the understanding that it should not be valid unless the amount of $75,000 in subscriptions should be obtained? Answer: "Yes."

2. Was the amount of $75,000 in subscriptions to plaintiff obtained? Answer: "No."

3. Was the said subscription of A. B. Andrews, deceased, made for the purpose of erecting a modern apartment building at the corner of Edenton and Wilmington streets, in the city of Raleigh? Answer: "Yes."

4. Has such purpose been abandoned by the plaintiff? Answer: "Yes."

5. Are the defendants indebted to plaintiff, and if so, in what sum? Answer: "No."

J. C. Biggs for plaintiff.

Manning & Kitchin and A. B. Andrews, Jr., for defendant.

BROWN, J. The following written contract was entered into by the late Col. A. B. Andrews, the defendant's testator, with plaintiff on 17 February, 1914:

"I hereby subscribe for ten shares of stock of the par value of one hundred dollars each in the Raleigh Improvement Company, a corporation organized under the laws of the State of North Carolina, for the purpose of erecting a modern apartment building at the corner of Edenton and Wilmington streets, in the city of Raleigh. I also agree to make immediate payment of 30 per cent of the amount of my subscription, and the balance as and when called for by the board of directors of said corporation. A. B. ANDREWS. (SEAL)"

The executors having declined to pay the subscription, this action is brought to recover it.

1. The declarations of Colonel Andrews to his son William, to the effect that he had subscribed to the house proposition "provided the balance of the money is raised to complete it," are incompetent. Such declarations to a third party are purely hearsay, not being under oath and not subject to cross-examination. If the testator were living, such declarations would be incompetent and the fact that he is dead does not alter the rule. Lockhart on Ev., 148, and cases cited. *Shaffer v. Gaynor*, 117 N. C., 24; *Redman v. Redman*, 70 N. C., 257. The evidence is also incompetent because it tends to vary the terms of a written contract. *Walker v. Venters*, 148 N. C., 388. This rule of law is fully discussed and the precedents collected by *Mr. Justice Walker* in *Basnight v. Jobbing Co.*, 148 N. C., 356.

The fact that this is a subscription to stock does not take the case out of the usual rule. It seems to be generally agreed that where a subscription contract is reduced to writing and signed, all oral agreements, whether prior or cotemporaneous, are merged in it and parol evidence of them cannot be received to vary the legal purport of the writing. *Boushall v. Stronach*, 172 N. C., 273; 7 R. C. L., 228-9; *R. R. v. Leach*, 49 N. C., 340; *Boushall v. Myatt*, 167 N. C., 328; 26 A. and E., 911; 10 Cyc., 413-414.

The subscriber to the stock should have caused the condition upon which he subscribed to be inserted in the written instrument.

2. In our opinion, there is no evidence that the purpose of plaintiff to build an apartment house has been abandoned. There is evidence that, owing to present conditions, it has been postponed. That is a matter resting in the discretion of the directors. The mere fact that the work on the corporate undertaking has been suspended is not such evidence of an abandonment of the enterprise as will discharge a subscriber from his obligation of payment, since the refusal of the subscribers to pay according to their contracts may be the very cause of suspension, and the very object of the attempt to enforce their contracts may be to get money to revive or continue the prosecution of the work. 10 Cyc., 406; 28 A. and E., 932.

Thompson Commentaries on Law of Corporations, vol. 1, sec. 1272. Assuming that the corporate authorities have decided that it is best under present conditions to abandon the building of the apartment house, that does not necessarily release the unpaid subscriptions.

A mere abandonment of the corporate enterprise is not necessarily a good defense to an action upon a subscription. 28 A. and E., 932. It may be good ground for an action to dissolve the corporation and to wind up its affairs. Conceding that the corporation has arrived at the

conclusion not to construct the building as designed, it by no means follows that its contracts and engagements are thereby at an end. Debts due by the corporation are not abrogated, and its ability to discharge these may be dependent upon its realizing from the claims owing to it. The unpaid subscriptions to its stock constitute assets of the corporation and are a trust fund to which creditors may resort.

If all the debts of the corporation are discharged, even then the legal consequences claimed by defendant would not necessarily follow. A few stockholders may have paid all their subscriptions, while others may have paid none, and thereby defeated the undertaking. It would be manifestly unjust to hold those subscriptions that have been paid and to turn loose those that remain unpaid.

Inasmuch as stock subscriptions are assets, they must be collected as other assets, and when the debts are all paid and the corporate affairs settled the balance on hand should be divided among stockholders according to their respective rights. *Dorman v. R. R.,* 7 Fla., 281; *R. R. v. Bailey,* 18 Ohio St., 208.

It is true that on being satisfied that stockholders have paid in an amount equal to their engagements, so as to make the burden equal amongst them all, a court of equity will sometimes interfere in case of an abandonment of the undertaking to prevent further calls upon such stockholders, but no such conditions appear to be presented upon this record and no such equitable relief is asked.

We are of opinion that upon all the evidence and in any view of it, the court should have directed a verdict for plaintiff as requested.

New trial.

HENRY POPE v. W. B. POPE ET ALS.

(Filed 23 October, 1918.)

1. **Appeal and Error—Objections and Exceptions—"Broadside"—Exceptions.**

Where objectionable and unobjectionable evidence is covered by only one exception, the exception, on appeal, will not be confined to that which is objectionable, or considered.

2. **Evidence—Deceased Persons—Transactions or Communications—Statutes—Restricted Testimony.**

Where a person claiming title to lands in controversy through or under a deceased person has testified to a transaction or communication with him relating to the lands, the adversary party is restricted in his testimony to evidence concerning the same matter. Revisal, sec. 1631.

3. **Same—Limitation of Actions—Parol Trusts—Trusts and Trustees.**

The plaintiff, having acquired a deed conveying the fee-simple title to the lands in controversy, may not testify to a transaction with his de-

ceased grantor, whereby he claims that a parol trust was engrafted on his title in favor of another for life, and thus bar the defense of adverse possession set up by the defendant in the possession of the lands, when the defendant has not opened up this matter by his testimony; for the same is a transaction with the deceased person, within the intent of Revisal, sec. 1631.

4. Ejectment— Title— Burden of Proof— Issues— Answers— Instructions— Appeal and Error—Harmless Error.

In ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of that of the defendant; and where, in his action to recover lands, the jury, by their answer to appropriate issues, under legal evidence and a correct charge, have found that the plaintiff's deed was procured by fraud, and therefore invalid to pass the title, thus defeating plaintiff's recovery, the charge on the other issues, raising only the question of defendant's title by adverse possession, etc., becomes immaterial.

ACTION tried before *Devin, J.*, and a jury, at March Term, 1918, of CUMBERLAND.

Plaintiff sued for the recovery of several tracts of land described in his complaint, and specially relied on a deed of W. B. Pope and wife to him, dated 12 December, 1881. The defendants claimed under W. B. Pope and wife and attacked their deed to the plaintiff upon the ground of duress and fraud, and in support of their allegations they alleged, and introduced evidence tending to show, that at the time the deed was executed on 12 December, 1881, plaintiff held a mortgage on the property for $400, which had been reduced to $300, establishing the relation of mortgagor and mortgagee between the parties, and that there was really no consideration for the deed, though one was recited in it, and that it was not fairly obtained from the grantors by the plaintiff, but, on the contrary, was procured by duress and fraud, W. B. Pope having been plied with whiskey by the plaintiff and being at the time in a state of intoxication from the use of it, and besides, that while in that condition, he was threatened and cajoled and deceived by the plaintiff into executing the deed.

Defendants also alleged that they had been in the possession of the land since the deed was made, and for more than seven years, holding and claiming the same in their own right and notoriously, continuously and adversely for that length of time.

Plaintiff replied and alleged that the possession of defendants was held in subordination to their right and title, and not adversely, up to the time when Mrs. W. B. Pope, who survived her husband, died, which occurred within a year or two before this action was commenced. That when the deed of 12 December, 1881, was executed, a life estate was expressly reserved by parol to Mrs. W. B. Pope, and that she, therefore, held possession under this reservation, not against the plaintiff, but by

his express oral permission, and, therefore, the statute of limitations had not run so as to defeat his title or bar his right of possession.

Mrs. L. B. Raynor, in her own behalf and as a witness for the other defendants, was permitted to testify over plaintiff's objection to certain transactions or communications between plaintiff and her father, W. B. Pope, at the time or just before the deed was executed, tending to show duress and a want of consideration for the deed, and plaintiff, in his own behalf, proposed to testify that the consideration recited in the deed was made up of a cash payment of $150, two notes, one of which was for $200, and the other for $300, the amount of the mortgage ($400), which was canceled, and the payment of a mortgage on the land to Lewis Tew of $150, and that the two notes given by him to W. B. Pope were paid when they matured.

In regard to this testimony, the record states: "W. B. Pope came to see me about selling the land, and offered to sell it to me for $1,150, and I bought it from him at that price. I went over to W. B. Pope's house with I. W. Godwin, justice of the peace, in accordance with agreement with W. B. Pope, and the deed was prepared and signed. I paid him $100 cash and gave him two notes, one for $200, due sixty days after date, and one for $300, due the following fall, and receipted for the $400 mortgage which I had against W. B. Pope, and agreed in addition to take up a mortgage of approximately $150 which Lewis Tew held against W. B. Pope, and I paid the notes which I gave him when they were due and paid the Tew mortgage."

The foregoing testimony by Henry Pope was objected to by the defendants, the objection was sustained, the court restricting plaintiff's testimony as to personal transactions with W. B. Pope, deceased, to those concerning which defendants had offered evidence, and plaintiff excepted. The same may be said as to the testimony of another of the defendants, Troy L. Pope, so that the two exceptions will be considered together as they involve the same question. There are some other exceptions, which will be noticed hereafter.

The jury returned the following verdict:

1. Was the conveyance of the land described in the complaint by deed from W. B. Pope and wife to Henry Pope, dated 12 December, 1881, without oppression to said W. B. Pope, and for a fair consideration? Answer: "No."

2. What consideration, if any, was paid for the conveyance of said land? Answer: "None."

3. Was the said deed from W. B. Pope and wife to Henry Pope procured by fraud and undue influence? Answer: "Yes."

4. Was the mortgage debt due plaintiff fully paid? Answer: "Yes."

5. After the execution of 12 December, 1881, did W. B. Pope and

wife remain in possession of said land and hold adversely to the plaintiff up to the death of Mrs. Susan Pope? Answer: "Yes."

6. Has plaintiff been in possession of said land within twenty years before the commencement of this action? Answer: "No."

7. Has W. B. Pope been in possession of the 93-acre tract of land under known and visible lines and boundaries and colorable title for seven years before the commencement of this action? Answer: "Yes."

8. Is the plaintiff the owner and entitled to the possession of any part of the land described in this complaint, and if so, what part? Answer: "None."

9. Are the defendants, or any of them, in the wrongful possession of any part of the said land? Answer: "No."

10. What damages, if any, is plaintiff entitled to recover therefor? Answer: "None."

Judgment was entered upon the verdict, and plaintiff appealed.

Sinclair & Dye, Rose & Rose, E. F. Young, and N. A. Townsend for plaintiff.

C. W. Broadfoot, John G. Shaw, and J. C. Clifford for defendants.

WALKER, J., after stating the case: There is one fatal defect in the objection of the plaintiff to the testimony of Mrs. L. B. Raynor and Troy L. Pope. It was taken "to all of the foregoing testimony"—that is, to the same as a mass, and not to the separate parts thereof. Some of the testimony is plainly competent, and even if the other part is not so, the objection fails, as it did not point out the incompetent testimony or separate it from the competent testimony, and assign error only as to it. *R. R. v. Mfg. Co.*, 169 N. C., 165, 169; *S. v. Ledford*, 133 N. C., 722; *Bank v. Chase*, 15 N. C., 108; *S. v. Stewart*, 156 N. C., 636; *Ricks v. Woodard*, 159 N. C., 647; *Quelch v. Futch*, 175 N. C., 694.

There is some of this testimony which did not disclose any transaction or communication between the witness and the deceased party, and for the most part it refers to what the plaintiff himself said or did, and he has had full opportunity in this respect to reply and give his version of the particular transaction.

As to the other objection, the court was clearly right in confining the testimony of the plaintiff to those transactions or communications as to which the other witnesses had testified. As shown in *Bunn v. Todd*, 107 N. C., 266, recently quoted with approval in *Irvin v. R. R.*, 164 N. C., 6, at p. 15, the exception is this: "When the representative of, or person claiming through or under the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the *same transaction*," citing

Burnett v. Savage, 92 N. C., 10; *Sumner v. Candler,* 92 N. C., 634. We see, therefore, that the testimony of the other party, in reply, must be restricted to the same transaction which was the subject-matter of the principal testimony, or that of the other party, and the court, as we construe the record, so confined the plaintiff's testimony, and consequently did not deny him any right to which he was entitled. The object of this wholesome statute (Revisal, 1631; Code, 590; C. C. P., 343) is well set forth in *McCanless v. Reynolds,* 74 N. C., 314, as follows: "Allowing a party to an action to give evidence in his own behalf is a wide departure from the rules of evidence at common law, and the proviso in section 343, which fixes a limit to this departure, should be construed liberally. The effect of it is to exclude one of the parties to a transaction, who is afterwards a party to an action concerning the right or property involved in the transaction, from the enabling clause of the statute, in the event of the death of the other party to the transaction. The proviso rests on the ground not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance, even by the oath of a relevant witness, to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction."

This rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified.

The court was right in excluding the testimony of the plaintiff as to the tenancy of W. B. Pope and his wife and as to the parol agreement that Mrs. Pope should have a life estate. This involved necessarily a direct transaction or communication between plaintiff and Mrs. Pope, who is dead, and comes within the inhibition of Revisal, sec. 1631. *Harrell v. Hagan,* 150 N. C., 242, and cases cited, and *Boney v. Boney,* 161 N. C., 614, where the parties are reversed, but the point decided is substantially the same as the one now being discussed.

As to *Cheatham v. Bobbitt,* 118 N. C., 343, which was cited by the plaintiff's counsel, it is not applicable, because there the witness spoke of a certain transactions, including the whole of it, and the court correctly permitted the other party to testify to the same extent in contradiction of his testimony. In this case, some of the proposed testimony related to matters clearly outside of or foreign to the particular

transaction or communication to which the two witnesses had testified, and the court therefore properly closed the door to it.

Abstractly considered, that part of the charge concerning the legal effect of a parol conveyance of the land, or rather and more correctly, of the oral lease of it to Mrs. Pope for her life—if evidence of it had been competent and the first four issues had not been answered as they were—would have been erroneous; and so would the other instruction, in regard to adverse possession, in which the word "adverse," or any equivalent expression, was omitted whereby the bare possession, if continued for seven years, was made sufficient as a bar to plaintiff's recovery. This omission evidently was an inadvertence. But these are not concrete questions, as the plaintiff's case was cut up by the roots when the jury answered the first four issues, for these issues mean that plaintiff obtained the deed of 12 December, 1881, by fraud and undue influence, and there was ample evidence to support the findings. If he did not own the land, it can make no difference whether the possession was adverse or not.

In ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary (*Bettis v. Avery,* 140 N. C., 184; *Rumbough v. Sackett,* 141 N. C., 495); it must be good against the world or good against the defendant by estoppel. *Mobley v. Griffin,* 104 N. C., 112; *Campbell v. Everhart,* 139 N. C., 503. It can make no difference whether defendant has the title or not, the sole inquiry being whether plaintiff, upon whom rests the burden, has it. If he fails to show that he has the title and right of possession, it does not concern him what right or title the defendant has, if any, or whether he has any at all. In this case, the foundation upon which rested the plaintiff's right to recover has been destroyed by the verdict upon the first four issues.

What we have just said regarding the instruction as to adverse possession applies equally to the exception relating to the parol conveyance or lease of the land or parol lease to occupy it during Mrs. Pope's life. It may not have passed title to her, as said by the court, but if not, it may have been evidence of the nature of her possession, as it tended to show, if true, that she was let into possession by the plaintiff. and being in under him or by his permission, it could not be adverse, just like the case of a tenant who holds under and not against his landlord. But this is not a practical question, as plaintiff, under the verdict on the first four issues, had no title to be barred by adverse possession. The other questions would have become material only if he had won as to these four issues. The other exceptions are either covered by what precedes or they are so manifestly untenable as to require no separate discussion.

We are of the opinion that there was no error committed in the trial of the case.

No error.

BESSIE COLE v. CITY OF DURHAM, STRAUSS-ROSENBURG COMPANY, AND THE CAROLINA POWER AND LIGHT COMPANY.

(Filed 30 October, 1918.)

1. **Negligence—Delivery of Coal—Raising Door in Sidewalk—Pedestrians.**

The owner of a store in a populous city, to which coal was to be delivered by a dealer, instructed his employee to go into the cellar to unlock the door over a coal hole on the sidewalk where pedestrians were constantly passing. After the employee had done so, and, receiving no answer to his signal to the driver of the coal wagon, who was supposed to open the cellar door and warn pedestrians, he suddenly and, without warning of any kind to the plaintiff, raised the door and threw her down, causing the injury complained of in the action: *Held*, evidence of actionable negligence on the part of the employee of the store, for which the owner is responsible.

2. **Same—Dealer in Coal—Principal and Agent.**

A dealer in coal undertook to deliver it at a store in a populous part of the city, through a coal hole, covered by a door flush in the sidewalk where pedestrians were constantly passing. The city ordinance required that in such instances some one should be stationed to warn the passers-by. There was evidence tending to show that the door was pushed open from beneath, by an employee at the store, as the plaintiff was passing, causing her, without warning, to fall, to her injury, though the dealer's driver was standing near, whose duty it was to give the warning and to raise the door after it had been unfastened from beneath: *Held*, sufficient to take the case to the jury, upon a motion to nonsuit, of the actionable negligence of the driver in causing the injury, for which the dealer, his principal, would be liable.

3. **Negligence—Delivery of Coal—Coal Hole—Notice to Pedestrians—Principal and Agent.**

Where an ordinance of the city requires that notice be given to pedestrians that the doors to a coal hole in the sidewalk are about to be opened for the purpose of delivering coal at a store, and the owner of the store is present at the time and depends upon the driver of the delivery wagon to give this notice, whose failure to do so causes an injury to a pedestrian, the negligence of the driver will be imputed to the owner of the store.

4. **Same—Contributory Negligence—Evidence—Questions for Jury—Trials.**

There was evidence in this case tending to show that while the defendant dealer was making delivery of coal at a store, the plaintiff stepped upon the door to the coal hole flushed with the sidewalk, and was injured by the door being suddenly, and without warning, pushed up from beneath by the defendant purchaser's agent, an ordinance of the city requiring that some one, under the circumstances, be placed there to warn the pedestrians; that the defendant's driver was present, in his "business garb,"

with the delivery team, which, the defendant contended, should have caused the plaintiff to look out for her own safety: *Held*, if this were evidence of contributory negligence on the plaintiff's part, still this question, including that of proximate cause, should be submitted to the jury, and a motion to nonsuit was properly denied.

5. Negligence—Joint Tort Feasors—Evidence—Questions for Jury—Trials.

Where, in the delivery of coal by means of a coal hole in a cellar, a pedestrian is injured by stepping upon the door, flushed with the sidewalk, which was suddenly pushed up from beneath, without warning and in violation of the city ordinance, and there is evidence of negligence on the part of the coal dealer and of the purchaser of the coal in this respect, the apportionment of the liability between them does not affect the pedestrian's right to recover against them both, as joint tort feasors, and the issue as to their actionable negligence was properly submitted to the jury.

6. Negligence—Inherent Danger—Independent Contractor—Contracts.

Where the dealer delivers coal to his purchaser at the latter's store in a populous city, through a coal hole in the sidewalk of one of its principal business streets, where pedestrians are constantly passing, and a pedestrian is injured by stepping upon the door to the coal hole, flushed with the sidewalk, which was suddenly and, without warning, pushed up from beneath, contrary to the city ordinance, the delivery of the coal in this manner is so inherently dangerous that the dealer may not escape liability by showing that he had contracted for the delivery of the coal with another, who bore the relation to him of an independent contractor. As to whether such relationship existed, under the evidence in this case. *Quære?*

BROWN, J., dissenting as to the defendant, Carolina Power and Light Company.

ACTION tried before *Bond, J.*, and a jury, at March Term, 1918, of DURHAM.

This action is brought by the plaintiff against the city of Durham, Strauss-Rosenberg Company, and the Carolina Light and Power Company to recover damages for injuries sustained by falling into a coal hole about four by six feet in the sidewalk on Main, the principal business street of the city of Durham. On 30 July, the plaintiff was going from her home about 8 o'clock in the morning to C. W. Kendall's store, where she worked as a milliner. The evidence discloses that when plaintiff reached the point in front of Strauss-Rosenberg Company's store some one passed her on the north, and that she stepped a little to the south upon the steel doors that covered the coal hole and constituted a part of the sidewalk, and when she did so the door was pushed up from underneath and she was thrown to the ground and injured. That at the time she approached the coal hole a member of the firm of Strauss-Rosenberg Company was standing in the front door of the store and a colored man in workman's garb was standing east of the coal hole doors. That the defendants Strauss-Rosenberg Company had purchased from the defendant Power Company five tons of coke to be delivered in the

basement of said Strauss-Rosenberg's store about 30 July, the date of the injury. That the Power Company had employed Allen Jeffries to make the delivery of the coke, and that the colored man standing near the coal hole was the son of Allen Jeffries, who had been sent with a load of coke. The son (George Jeffries) told one of the firm of Strauss-Rosenberg Company that he had a load of coke to unload, and a young 15-year-old boy was sent to the basement to unfasten and open the coal hole doors, and this fact was known by defendant Rosenberg and the colored man, George Jeffries, who was sent to deliver the coke and who was standing just east of the doors when the injury happened. It was not contended by plaintiff that the coal hole doors were dangerous when closed.

Plaintiff testified, in part, as follows: "I had to step on the door to pass the person I was meeting. I turned to get out of the way of some one and stepped on this coal hole door. I kept my left foot on the sidewalk until I raised it up and it went under the edge of the door (demonstrating to jury). I could not tell you whether I was in the middle of the sidewalk coming down the street until I got to the doors or not. I was walking so that I had to step on that door. If I had kept straight on and had not turned I would have passed by the door, I suppose, without stepping on it. Some one passed me, though. I stepped my right foot on the door and it bumped me up so I had to fall. The first time I stepped on the door, to my knowledge, I put my right foot on the door and it bumped me up, and I tried to catch hold with my left foot and it caught under the door and threw me. . . . Before I fell I saw the coke wagon standing there, and that is why I looked around; that was before I reached the door. I knew they were to put the coke in that hole, of course. The doors were down when I stepped on them; no one was standing there to open it. The man didn't tell me to stay off. The man was standing where I said he was when I first saw him. I don't know that I saw him when I stepped on the door. If they had been opening the door I would not have stepped on it. I saw a man standing there; he was standing on the sidewalk at the southeast corner of the door; the door opened back towards him. . . . When Mr. Strauss came to see me after the injury he told me he had sent his boy to unlatch the door and the boy said he pushed the door up. I have stated as a matter of fact that the doors were flat down when I first stepped on them; they bumped up under my feet. The wagon was backed up to the curbing and the driver was standing on the sidewalk to the east of the doors; he was not standing on the doors, but was standing on the sidewalk to the east of the doors. A few seconds before I stepped on the door I saw him standing up straight. If he had leaned forward to catch hold of the door I certainly could have seen him; I could have

seen the motion of him if I had been looking down on the ground. It would have taken a mighty long man to have reached over there to catch on this door from where I saw him standing at that time and raise that catch; he could not have done it without my seeing him. The man or lady whom I spoke of as coming from the east as I was coming from the west caused me to step on the side to let them pass."

The jury returned as their verdict upon the four issues submitted by the court that the defendants, except the city of Durham, were guilty of negligence as alleged in the complaint; that plaintiff was not guilty of contributory negligence, and then assessed her damages at $5,000.

There was in force at the time of this occurrence an ordinance of the city of Durham as follows: "Every owner or occupant of a house on a street which has a cellar door or vault in a public footway shall keep the same in good repair and shall keep the door closed at all times, or a guard stationed there to warn the public." A penalty was attached for disobedience of it.

The court entered judgment of nonsuit as to the city of Durham and judgment upon the verdict as to the other defendants, and the latter separately appealed.

Brawley & Gantt and Scarlett & Scarlett for plaintiff.

R. O. Everett and J. S. Manning for defendant Strauss-Rosenberg Company.

William G. Bramham for defendant Carolina Power and Light Company.

WALKER, J., after stating the case: The record in this case is quite voluminous and the briefs lengthy, but very ably prepared, and have been of great assistance to us in eliminating from the great mass of testimony and argument the real questions at issue, which are few and, as we think, free from any difficulty.

We may say in the beginning that there is no complaint from any one of the coal cellar and its doors either as to construction or the material used. The owner, in this respect, had fully complied with the law and his duty in the premises in making the opening in the sidewalk both safe for the public and practically convenient for those using it as a receptacle for the storage of coal, which is the purpose for which it was designed.

The simple facts are that the plaintiff was in the rightful use of the sidewalk in this populous and thriving city, coming from her home to her place of business about 8 o'clock in the morning. As she approached the doors of the cellar in the sidewalk, near its middle, over which pedestrians constantly passed and repassed, she met some one walking

on the same side that she was, and this caused her to step a little to the south side, with her right foot on the door of the cellar, and as she did so it bounced up and threw her into the street in a sitting posture. She stated that the door was pushed up suddenly and unexpectedly, as it was "flat down" when she stepped upon it. No one gave any signal or warning of danger, or that the door was then being used and would be raised by a man in the cellar or any other person just at that time, and there is evidence to show that she felt justified in supposing that she could pass over the doors safely. As there was a motion for nonsuit, we must assume all evidence in her favor to be true, and we need, therefore, refer to so much only as tends to prove an actionable wrong to her.

George Jeffries, who was driver of the truck filled with coke, was near the cellar doors, but was not raising them, or if he did assist in opening the doors by raising them from the outside while Raymond Shives, servant of defendants Strauss-Rosenberg Company, who was in the cellar, was pushing them from below, he gave plaintiff no warning of the impending danger, and by his inaction led her to believe that no harm would come to her if she proceeded on her way.

There is evidence that one of the defendants, Charles Rosenberg, had been told by George Jeffries, the driver, in the store, that he had coke in the truck at the front to be placed in the cellar, and that he could not raise the doors, and Rosenberg, who was in the gallery of the store, then "called down" to Raymond Shives and ordered him to the basement to unlock the door, which order he obeyed, and in doing so he unlocked the door and, receiving from the man on the sidewalk no answer to his signal that the door was unlocked, he raised the doors himself.

This was manifestly negligence on his part, and for it his employers are responsible. The mere fact that he got no answer from the man supposed to be in position on the sidewalk to raise the doors was some notice to him that the latter was not on guard, and that it would be dangerous to raise the door, and it proved to be so in this case. He could not know the situation above him with the doors between him and the surface of the sidewalk, and it was not only negligence, but recklessness, to have acted as he did under the circumstances, as it was the contention of the defendants Strauss-Rosenberg Company, and there was proof to support it, that the doors were to be raised by some one on the sidewalk and not from the basement.

Raymond Shives was seen in the cellar when the cellar door was ajar. It is true that one, or perhaps two, of the witnesses testified that George Jeffries did raise the door, but this, if true, is not necessarily inconsistent with the fact that Raymond Shives pushed it up from the cellar,

for one may have pushed while the other pulled, as it is apparent that in this operation they were expected to act in concert—one to unlatch the door and the other to raise it. George Jeffries may have been a little slow in his movements. If he had been at his proper place and in the performance of his duty of raising the door at the right time he would by his very act have warned those approaching the doors on the sidewalk of the danger.

We have no doubt of the negligence of Raymond Shives. His act was *per se* dangerous and almost sure to cause injury to pedestrians on the main street in that populous city at an hour, too, when the street was much used by those going from their homes to their daily tasks. As to George Jeffries, if he was there, as the evidence shows he was, to lift the doors and set them perpendicular to the sidewalk, by the use of the horizontal iron rod, he should have given notice of the fact to those using the sidewalk of his purpose.

The ordinance required that the man in his position should stand on guard and inform the public when the doors were about to be used, so that they might be avoided. Its language is that the doors shall be kept closed at all times, or a guard stationed there to warn the public. This notice must be given before the doors are opened, or in time for the public to keep away from them. If that had been done in this instance the lady would not have received her injuries, for she says that she stepped on the door when it was closed, and, of course, if it had been kept in that condition she would not have been harmed, or if she had been properly warned the same result would have followed.

Before leaving this part of the case, we may say that if Mr. Rosenberg thought that because George Jeffries was there it was a sufficient compliance with the ordinance, and he relied on Jeffries to give the necessary warning to the public, it is the misfortune of his firm that Jeffries did not do so, and not the fault of the plaintiff, and they must take the consequences of his neglect.

The defendants, though, contend that the plaintiff saw Jeffries on the sidewalk near the doors, knew that he was driving the truck, as he had on "business garb," and also knew that the coke would be put in the cellar, and that, knowing all of this, it was her clear legal duty to be forewarned and not step on the door, and that, as a matter of law, she was guilty of contributory negligence which approximately caused her terrible injuries. But even if this be so, it leaves out of consideration other important facts and circumstances which she is entitled to have weighed by the jury in passing upon her negligence, which makes it a question for the jury to be tested and determined under the rule of the prudent man. She testified that the doors were "flat down" when she stepped upon one of them, and it was raised after she got upon it, and

that Jeffries did not stoop or attempt to open the doors, nor was he near enough to do so. Her language is "The man was standing straight and beyond the door. . . . It was not but a little while after I saw him until I fell. He didn't stoop. I didn't watch him all the time, but I saw him standing there. I did not stumble on the door, it was raised under my foot; the door was pushed up and me standing on it. My right foot was on the door and the door pushed up. I could not tell where my left foot was."

In this view of the evidence, and it could be presented much more strongly for the plaintiff should more of it be added, it was proper to submit the question of contributory negligence to the jury if there was any evidence of it at all. Her freedom from negligence more clearly appears when we consider that she saw one of the defendant firm, Mr. Rosenberg, in the door of the store as she passed, and neither he nor George Jeffries warned her not to step on the cellar door, though they both knew that Raymond Shives had gone down to open the door. They must have deemed it safe for the public to use the door as a part of the sidewalk, or surely they would have been on the alert and given proper notice of the danger. Rosenberg denied that he was in the door, and Strauss was not there, so he testified, but this apparent conflict in the testimony was a matter for the jury to consider. The city, by its ordinance, had provided for a warning and a safeguarding of the public by having a man stationed there for the special purpose of giving it; but this was not done, or if George Jeffries was there for the purpose or relied on by Rosenberg to perform this service, he utterly failed to do so, and he might as well have not been there as to thus fail in the duty assigned to him. *Holland v. R. R.*, 143 N. C., 435, 438 (*S. c.*, 137 N. C., 373, 374). We said there that where one is required to watch and guard at a dangerous place to prevent injury to others, which resulted by reason of his omission to do so, it is negligence to fail in this duty, and the injury is referred by the law to the neglect to watch and forewarn as its proximate cause. 143 N. C., at p. 438.

Our conclusion is that there was evidence of the joint negligence of the two defendants, the Power Company and Strauss-Rosenberg Company, and that it was properly and correctly submitted to the jury. The conduct of the plaintiff would not have warranted an instruction that, upon the admitted facts in regard to it, she was guilty of negligence which made her, in law, the sole author of her own injury. The case was, without doubt, one where the jury was required to pass upon the evidence and find the ultimate fact of negligence under the instructions of the court. We have so far considered only the evidence in the case, as we think that whether the defendants were jointly negligent is largely a question of fact. It may be proper, perhaps, to refer gener-

ally to the principles of law which are involved, although they are well settled.

The case of *French v. Boston Coal Co.* (and *Same v. Converse*), 81 N. E. (Mass.), 265 [11 L. R. A. (N. S.), 993], is much like this one in its facts and principles, and the Court there said: "It was the duty of Elisha S. Converse (owner of the premises) and his servants and agents to see that the coal hole, when used for the purpose of putting in coal for heating purposes, was properly guarded and protected, so that persons passing along the sidewalk and in the exercise of due care would not be liable to fall into it. They were not relieved of this duty by the fact that the coal company was also using it for the purpose of putting in the coal which had been ordered by them. *Poor v. Sears,* 154 Mass., 539 (26 Am. St. Rep., 272; 28 N. E., 1046); *Blessington v. Boston,* 153 Mass., 409 (26 N. E., 1113). Similarly, the coal company owed a like duty to those passing along the sidewalk, and was not relieved of it by the obligation which rested upon the defendant Converse and his servants and agents. There was evidence warranting a finding that the servants of each defendant were negligent in the performance of this duty. The jury could have found that the servants of the defendant Converse knew or ought to have known that coal was being put in, and that the cover was laid back and the hole was open, but that they took no precautions to warn or protect travelers from falling into it. They could also have found that, notwithstanding their testimony to the contrary, the men who were putting in the coal for the coal company took no precautions to guard against such an accident as happened to the plaintiff. The question of the plaintiff's due care was rightly left to the jury. It could not be ruled, as matter of law, that he was not in the exercise of due care."

It can make no material difference in the result whether Miss Cole fell in the hole which was opened by raising its covering, or was lifted on one of the door lids and catapulted into the street, except in the degree of injury to her. As it was, she was severely and most painfully hurt, having sustained a serious fracture of both wrists and a permanent injury, according to the medical testimony. The danger of this place consisted in its being on the sidewalk of the principal street of this city, where its inhabitants passed every minute of the day, and there was a constant and continuing menace to their safety unless it was properly guarded and sufficient warning given when it is about to be used, and whether it would constitute a pitfall or a stumbling-block is beside the question. The defendants are jointly and severally responsible, because they together caused the injury, and, as between them and the plaintiff, the law will not apportion the liability. *Gregg v. Wilmington,* 155 N. C., 18.

In *Chicago v. Robbins,* 2 Black (N. S.), 418 (17 L. Ed., 298); *Robbins v. Chicago,* 4 Wall. (N. S.), 657 (18 L. Ed., 427), and *Holman v. Stanley,* 66 Pa., 464, it was held that the owner of the abutting property could not escape liability to the injured party by showing that the work was being done by an independent contractor, who negligently left the opening in the sidewalk unguarded. See, also, *French v. Boston Coal Co., supra,* at p. 994, and note.

In *Chicago v. Robbins, supra,* it was held to be essential that in regard to an area in the street or sidewalk, every possible precaution should be used against danger, and that the owner of the lot cannot escape liability by letting work to another or independent contractor who is negligent in doing the work which proves to be harmful to those rightfully using the street. The following propositions were substantially stated and decided in *Robbins v. Chicago, supra,* as appears from the syllabus of the case to be found in the report of it at page 427 in 18 L. Ed. of U. S., S. C. Reports: "The principle for whom the work was done cannot defeat the just claim of the corporation or of the injured party by proving that the work which constituted the obstruction or defect was done by an independent contractor. Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the employer is not liable. Where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

In this case, the defendants were doing this work together through their respective servants or employees, and they both did it negligently, whereby this plaintiff was injured, not being in fault herself, as the jury have determined. The defendants, who contracted for the purchase and delivery of the coke in the coal vault, are undoubtedly, legally and morally, liable for such negligence unless they can shift the responsibility clearly upon some one else, and this principle is necessary for the safety of the public especially in populous places. As we will demonstrate hereafter by the authorities, they have failed to do this, and therefore are liable. *Hart v. McKinna,* 106 App. Div. (N. Y.), 219 (4 N. Y. Supp., 216). The other defendant, who was to deliver the coke in the coal vault by lifting the door which covered it, failed in its duty to the public by not giving proper warning against an impending danger of which its servant had knowledge and the public none. When plaintiff approached the door, it was at rest, and she was lifted, as she stepped upon it, by its being pushed up from below, and without any previous notice to her that this would be done or that the door would be moved

at that time in any way. The mere fact that the driver was standing near by with his truck, even if some notice of the fact, has been held by the jury not to have been a sufficient warning.

There is another contention, which is that the Power Company is not liable because it employed Allen Jeffries to haul the coke to the store on the truck and unload it into the basement, and in this connection the Power Company pleaded that Jeffries was an independent contractor, and his negligence, or that of his driver, George Jeffries, was not imputable to it. Conceding, for the sake of argument, that but for the nature of the work to be done he would be an independent contractor and liable solely for his own negligence, we are of the opinion that the work was of a hazardous character or inherently dangerous, as it is said, and that such a plea cannot avail the Power Company.

Accepting as correct the definition of intrinsically dangerous work as stated in the cases cited by this defendant's counsel (*Vogh v. Geer*, 171 N. C., 672 (676); *Scales v. Llewellyn*, 172 N. C., 494 (497); *Laffrey v. Gypsum Co.*, 83 Kans. 347), we yet hold that the work to be performed in this instance was of an inherently dangerous character. It was to be done on the sidewalk of a populous city, at a place where people were constantly passing to and fro, and required the raising of the doors of a cellar practically in the middle of the sidewalk, thereby leaving a hole therein, with obstructing doors, above a deep basement. Both parties to the contract of hauling knew the situation and what was to be done. It is not like the case where baggage merely was hauled from one place to another to be deposited there (*Singer v. McDermott*, 62 N. Y. Supp., 1086), which is safe in itself, and only becomes dangerous by any negligence of the driver or those in charge of the wagon. Here the work was so dangerous that the city had passed an ordinance to safeguard the public and to minimize the danger, and to prevent it if possible. It is a case where the work itself is dangerous, and care must be taken to render it harmless to the public to the extent that this can be done. It is the opposite of the other case we have put. Everybody will say it is dangerous to open a hole in the middle of a street or sidewalk by raising a door where people may stumble or fall in, even when exercising care themselves, and which requires that proper caution be taken to prevent its natural tendency to do harm from actually resulting in injury to others.

In *Davis v. Summerfield,* 133 N. C., 325 (328, 329), quoting from *Bower v. Peate,* 1 Q. B. Div. (187-6), 321, the Court says: "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor might be expected to arise, unless means

are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

It was held in *Railroad Co. v. Morey,* 47 Ohio St., 207, that "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has left the work, without reserving to himself any control over the execution of it. But this principle has no application where a resulting injury, instead of being collateral and flowing from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case a person causing the work to be done will be liable though the negligence is that of any employee of the independent contractor."

The Court said in *Railroad Co. v. Moores,* 80 Md., 352: "Even if the relation of principal and agent or master and servant does not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to a third person or the public in the execution of the work." See, also, *Waters v. Pioneer Fuel Co.,* 55 N. W. (Minn.), 52; *Radel Co. v. Borches,* 147 Ky., 506 (39 L. R. A. (N. S.), 227). Cases recently decided by this Court are to the same effect as *Summerfield's case* and the others above cited.

In *Carick v. Power Co.,* 157 N. C., 378, 381, it is said, quoting from *Bridge Co. v. Steinbach,* 61 Ohio St., 375 (76 Am. St. Rep., 675): "The weight of reason and authority is to the effect that where a party is under a duty to the public or a third person to see that work that he is about to do or have done is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to another's injury."

And addressing itself to the proposition in a way more clearly related to the facts of our case, it was further said: "The governing authorities of a town may not absolve themselves of the duty of proper care

and supervision as to the condition of its streets and sidewalks, and when they authorize work to be done on them which is essentially dangerous or which will create a nuisance unless special care and precaution is taken, they are chargeable with a breach of duty in this respect, if care is not taken, whether the work is being done by a licensee or by an independent contractor. . . . The same principle holds as to the obligations of licensees and independent contractor doing work of the kind suggested, that is, when the work that is being done for their benefit or by their procurement is of a kind to create a nuisance unless special care is taken, they are charged with the duty of properly safeguarding it, and may not relieve themselves by delegating the duty to others," citing numerous cases, and among them *Bailey v. City of Winston,* 157 N. C., 252, where the matter is fully discussed.

An independent contractor is defined to be one "who undertakes to do specific pieces of work for other persons without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. 1 Shear & R. Neg., 164, 165. So it is said that an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of the work. *Powell v. Construction Co.*, 88 Tenn., 692 (13 S. W. Rep., 691)." *Waters v. Pioneer Fuel Co., supra.* See, also, *Denny v. Burlington,* 155 N. C., 33; *Hopper v. Ordway,* 157 N. C., 125, and *Johnson v. Railroad Co., ibid.,* 382, and the cases cited therein.

If the defendant Power Company has, by the proof, brought itself within the definition given, as to the liability of an employer who is operating through an independent contractor, the rule does not apply to the relation existing between it and Allen Jeffries at the time the injury was received by the plaintiff, according to the principles stated in the authorities we have cited. If the work to be done is dangerous only by reason of the absence of proper care in doing it, the doctrine as to an independent contractor may apply, but if it is dangerous in itself and will continue to be so, and probably cause injury unless reasonable care is taken to render it harmless to others who are themselves in the exercise of due care, it does not apply.

The cases cited by the Power Company in its brief may be distinguished from this one, and if any one of them really conflict with the cases upon which we have relied they are, in our opinion, opposed to the great weight of authority. Our decisions clearly support the view we have taken. We have not discussed the question whether Allen

Jeffries was an independent contractor, if the doctrine applied to a case of this kind.

Our conclusion as to this defense renders it useless to discuss the question as to the insolvency of Allen Jeffries or the other exceptions of this defendant or those of its codefendant, as the points we have considered are the dominant ones in the case. If there was error regarding other matters it was harmless, but we do not mean even to intimate that there was any such error. In all essential respects the case was correctly tried.

No error.

FURNEY KING v. NORFOLK-SOUTHERN RAILROAD COMPANY.

(Filed 30 October, 1918.)

1. **Railroads—Employer and Employee—Federal Employer's Liability Act—Pleadings—Amendments—New Cause of Action—Omissions—Answer—Aider—Trials.**

Where the plaintiff, an employee of a railroad company, was injured while at work on a car used in immediate connection with interstate commerce, and has brought his action in time, alleging this fact in general terms, and the defendant has answered, denying negligence, but also alleging with definiteness and particularity that the rights and liabilities of the parties were controlled by the Federal Employer's Liability Act, setting up defenses thereunder, and, accordingly, and without objection, the issues applicable have been submitted to the jury, with supporting evidence: *Held*, the cause coming within the provisions of the Federal act, it was not objectionable, at the close of the evidence, for the trial court to permit the plaintiff to amend his complaint by definitely alleging the statute in question, making definite averment as to the facts which brought his case within its terms and under its control, the amendment being only a formal statement of conditions already created by the parties, and about which there was no dispute; and, further, the answer, filed within the stated period, cured any omission in the complaint, under the doctrine of "aider," by its additional and supplemental averments.

2. **Same—Demurrer—Limitation of Actions.**

Where an action, brought by an employee against a railroad company, has been tried under evidence and issues within the intent and meaning of the Federal Employer's Liability Act, and the complaint has omitted to set forth facts with sufficient definiteness to bring the cause within its terms, and in reply the answer has sufficiently done so, the action is not demurrable on the ground that the plaintiff was permitted to amend his complaint more than two years after the cause accrued, and therefore barred under the terms of the statute in question, in that it alleged a new cause of action: first, the parties having elected to treat the action as being within the provisions of the statute, a change of front is not permissible; and, second, the omission in the complaint to allege the fact of interstate commerce is aided or cured by the full averments in the answer in that respect.

3. Railroads—Federal Employer's Liability Act—Damages—Loss of Mental Powers.

Where a defendant railroad is liable in damages for an injury negligently inflicted and coming within the provisions of the Federal Employer's Liability Act, the loss of the employee's mental powers is also an element of the damages recoverable, if supported by sufficient evidence.

ACTION tried before *Stacy, J.*, and a jury, at May Term, 1918, of WAKE.

There were facts in evidence on the part of plaintiff tending to show that on 15 May, 1916, while he was engaged as an employee of defendant company in repairing the drawhead of a caboose on defendant's yard in the city of Raleigh, said caboose being customarily used and to be used with trains hauling interstate freight, he received painful and serious injuries by the drawhead falling on him, this by reason of a defective jack screw, which he was using in the work, negligently furnished him by defendant company or its officers, agents, etc.

Defendant answered, denying there was any negligence on its part, and alleging that plaintiff at the time was engaged as an employee of defendant in an act of interstate commerce; that the rights of the parties were governed and controlled by the provisions of the Federal Employers' Liability Act appertaining to these cases, plead contributory negligence and assumption of risk, as allowed by the statute, and offered evidence tending to show that plaintiff was engaged at the time in an act of interstate commerce; that he was not injured by a defective jack screw and was not using any such implement at the time, but because, in the endeavor to raise one end of the drawhead, he allowed same to fall on himself. There was evidence also that plaintiff's injuries were not near so serious as he claimed, and that, as a matter of fact, no substantial injury had been inflicted.

The cause coming on for trial at said May Term, 1918, same commencing 20 May, jury was impaneled and issues framed under the Federal Employers' Liability Act and evidence offered by both parties on the issues. At the close of the testimony plaintiff was allowed by his Honor to amend his complaint and allege in definite terms that plaintiff, at the time he was injured, was employed by defendant in interstate commerce. Defendant excepted.

On issues submitted, the jury rendered the following verdict:

1. Was the plaintiff injured by negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer? Answer: "Yes."

3. At the time of the occurrence in controversy was the defendant a common carrier by railroad engaged in interstate commerce, and was

plaintiff employed by the defendant in such interstate commerce? Answer: "Yes."

4. Did the plaintiff assume the risk of the occurrence of his alleged injuries? Answer: "No."

5. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: "$1,500."

6. Is the plaintiff's cause of action barred by the two years statute of limitations? Answer: "No."

Judgment on the verdict, and plaintiff excepted and appealed.

Douglass & Douglass for plaintiff.
R. N. Simms for defendant.

HOKE, J. The principal exception urged for error was the refusal of the lower court to grant a motion to nonsuit. On the argument before us, it was conceded that there was evidence of negligent default and consequent injury under the Employers' Liability Act sufficient to carry the case to the jury, and the motion to nonsuit was insisted upon on the ground that in allowing the amendment, which was done on or after 20 May (31 May), a new cause of action was constituted, to wit, a claim under the Employers' Liability Act, and this being more than two years after the occurrence, such action would no longer lie.

It is expressly provided that an action under the statute will not lie after two years (*Belch v. R. R.*, at the present term, and authorities cited), and the question will depend on whether the amendment allowed had the effect of introducing into the record and controversy a separate and distinct cause of action.

On that question, a perusal of the pleadings and facts in evidence will disclose that the injury occurred on 15 May, 1916; that action having been instituted on 16th December following, plaintiff duly filed his verified complaint, giving his version of the facts, the place and time of the occurrence, and, without definite averment, that plaintiff, when injured, was engaged in an act of interstate commerce; that on 27 February, 1917, or near that time, defendant filed his verified answer, denying the negligence and consequent injury, and alleging that the plaintiff at the time was engaged in an act of interstate commerce and the rights and liabilities of parties were controlled by the Federal Employers' Liability Act, etc., setting up further the pleas of contributory negligence and assumption of risk as contemplated and allowed by the statute.

On issues joined, and without objection, these questions were submitted to the jury, the testimony on both sides showing that plaintiff at the time of the injury was engaged in repairing a car customarily used and to be then presently used in trains hauling interstate freight

under the controlling decisions applicable, clearly a case of interstate commerce (*N. C. R. R. v. Zachary,* 232 U. S., 248, and cases cited); and the action having been conducted to that time by both parties as one, under the Employers' Liability Act, at the close of the entire evidence, plaintiff, by leave of the court, was allowed to insert the amendment making definite averment that plaintiff was injured while engaged in interstate commerce. In such case, the State court having concurrent jurisdiction of causes under Federal Employers' Liability Act, the parties having, as stated, joined in submitting the issues appropriate to such an action, and the evidence of both sides showing that the act was applicable, we are of opinion that the omission by plaintiff to make definite averment on this question was cured by the allegations of the answer therein and the treatment of the parties concerning it, and the cause could be properly tried and determined as one under the statute without further allegation by the plaintiff. The amendment offered by him was without material significance on the record, being only a formal statement of conditions which the parties had already created and about which there was no dispute. *R. R. v. Wulf,* 226 U. S., 570; *Voelker v. Chicago,* 116 Fed., 867.

The parties are not only concluded by their treatment of the cause as one under the Employers' Liability Act, covered by the pleadings already filed, but the case, we think, properly calls for the application of the doctrine of "Aider" by the additional and supplemental averments in the adversary pleadings by which a defective statement may be supplied, a doctrine that prevails both in the Code and common-law principles of pleading, is recognized both in Federal and State procedure and in this jurisdiction, and the better considered decisions elsewhere extends to omissions in matters of substance as well as to other defects. *Whitley v. R. R.*, 119 N. C., 724; *Knowles v. R. R.*, 102 N. C., 59; *Garrett v. Trotter,* 65 N. C., 430; Clark's Code (3d Ed.), 232; *U. S. v. Morris,* 23 U. S., 10 Wheat., 246; *Stack v. Lyon,* 26 Mass., 62; *Shively v. Water Co.*, 99 Cal., 259; Bliss on Code Pleading (3d Ed.), sec. 437; Pomeroy's Remedies and Remedial Rights, sec. 579.

In *Renn v. R. R.*, 170 N. C., 129, it was held that under our State procedure an amendment of this kind, in any event, relates back to the institution of the suit. On writ of error, this decision was affirmed by the Supreme Court of the United States (241 U. S., 290); and while that Court held that such an amendment might very well present a Federal question, there is nothing in the case, as we understand it, which, on the facts of the present record, forbids the disposition we make of defendant's appeal. And in *Union Pac. R. R. v. Weyler,* 158 U. S., 285, a case very much relied on by defendant, plaintiff sued in a Missouri court for an injury occurring in the State of Kansas, setting forth a

common-law action for injury by reason of an incompetent fellow-servant knowingly retained by the employer. After the lapse of sufficient time to bar recovery, both under the Missouri and Kansas statutes, plaintiff amended his pleading and declared on a statute of the State of Kansas (required to be pleaded) making employers liable for negligent default of fellow-servants, and it was held that such an amendment introduced an entirely new cause of action and the statute of limitations was available as a defense.

In delivering the opinion, *Chief Justice White,* then Associate Justice, said, in effect, that such an amendment was not only a change from "fact to fact, but from law to law," and was an entire departure from the cause of action as originally constituted; but in our case there is no necessity to plead the statute—on the facts as shown in evidence by both parties, it prevails as the law of the case (*Voelker v. Chicago R. R., supra*), and plaintiff, as heretofore shown, having alleged the circumstances of the occurrence, omitting definite statement as to whether he was at the time of the injury engaged in an act of interstate commerce, defendant answers, making full statement of that fact, and the parties, acting under such plea, join issue and proceed to try the cause under the statute, and we think the omission in the complaint is thereby cured.

The case of *Fleming v. R. R.,* 160 N. C., 196, is in no way opposed to the position. In that case, the pleadings as interpreted by the court contained definite averment that plaintiff at the time of the injury was an employee on an intrastate train, and this being admitted in the answer it was held that the parties were precluded from showing facts in evidence contrary to their admission, the case bearing little or no resemblance to the facts of the present appeal. And *Kinney v. R. R.,* 166 N. Y. Supp., 868, and *Fort Worth v. Bayard,* Tex. Civ. App., 196 S. W., 597, to which we were also cited, were two causes, the first prosecuted through two trials as an action under the common law and statutes of New York, and the second as an action under a Texas statute, till after two years, when an amendment then made setting forth for the first time a cause of action under Federal Employers' Liability Act, was held to introduce a new cause of action, barred by the lapse of two years, as that statute provides; but we find nothing in either case or record which tended to show a waiver of the position by the parties, or which called for or permitted application of the doctrine of "Aider," which we have held to be the controlling features of the present appeal.

Defendant further excepted to the position of his Honor's charge as to assumption of risk, in terms as follows: "That issue bears upon the defendant's plea of assumption of risk. (Under the Federal Employers' Liability Act, the common-law doctrine that employees assume the risks, dangers and hazards normally incident to the business, still obtains. It

is pleaded by the defendant in this case, and the defendant has the burden of proof on that. The rule is that the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them. In either or both of which cases he does assume them if he continue in the employment without objection or without obtaining from the employer an assurance that the matter will be remedied"). A definition that accords with the controlling decisions on the subject. *Chesapeake and Ohio R. R. v. DeAtley,* 241 U. S., 311; *Gila Valley R. R. v. Hall,* 232 U. S., 94. Under the principles embodied in that statement, the question was correctly and fairly submitted to the jury, and they have determined the issue against defendant.

Again, it was contended that there was error committed in his Honor's charge on the question of damages in allowing the jury to consider the loss of mental powers when there was no evidence tending to show such loss, but the objection is not open to defendant, for, conceding that his Honor's charge is correctly interpreted in the exception, we find abundant evidence in the record as to the effect of the injury to justify and uphold the position.

In reference to the sixth issue, as to the bar by lapse of two years, having held that plaintiff's cause of action under the statute was covered by the original pleadings, all filed within the time (1) because the parties had elected so to treat it, and in such case a change of front is not permissible either in Federal or State procedure (*Ry. v. McCarthy,* 96 U. S., 258; *Lindsay v. Mitchell, etc.,* 174 N. C., 458; *Brown v. Chemical Co.,* 165 N. C., 421); (2) because the omission in the complaint to allege that plaintiff was engaged in an act of interstate commerce is aided or cured by the full averments of the answer in that respect, his Honor correctly ruled that, on the record and facts in evidence, if believed, the action was not barred by lapse of time.

On careful perusal of the record, we find no error to appellant's prejudice, and the judgment must be affirmed.

No error.

IN RE MARY V. MEANS, INFANT.

(Filed 30 October, 1918.)

1. **Habeas Corpus—Infants—Parents.**

The parents are *prima facie* entitled to the custody of their minor children, with the preference in favor of the father, if the choice is between them, when they are equally worthy and fitted therefor; though, when both are equally worthy, it may be awarded to the mother when it is shown that the best welfare of the child requires it.

2. **Same—Nonresident Parent—Orders—Bonds—Jurisdiction.**

Where, on appeal in *habeas corpus* proceedings brought by the wife to obtain the custody of her infant daughter from her husband, it has been found upon supporting evidence that the husband is unfitted to retain the child; that he had theretofore left it with its mother in another State and had secretly taken the child therefrom and brought it to this State and placed it with his own mother and sisters, who were well qualified and suitable therefor; and also that the mother was a fit and suitable person to have her child and give it the support, care and attention it required: *Held*, that on the facts presented in this record, an order of the lower court awarding the custody of the child to the mother is a proper one; and a requirement that she should permit the child to visit its father here, and, being a nonresident, that she give bond to obey the orders of the court, is improperly made.

3. **Habeas Corpus — Infants — Unsuitable Father — Custody Delegated — Rights of Mother.**

Where a nonresident mother has properly been awarded the custody of her child in *habeas corpus* proceedings in the courts of this State, against the claim of her husband, its father, and it has been found that the father of the child is an unfit and unsuitable person, the fact that he had placed the child with his own mother and sisters, who are fit and suitable, will not have any effect upon the rights of the mother to its custody.

4. **Habeas Corpus—Parents—Wife—Independent Domicile.**

Where the misconduct of the husband has forced his wife to leave him, she may acquire an independent domicile which may determine that of an infant child whose custody she seeks to obtain in proceedings in *habeas corpus* against her husband.

5. **Habeas Corpus — Parents—Nonresidents—Courts—Jurisdiction—Foreign Domicile—Awards Not Final.**

An award in *habeas corpus* proceedings does not finally determine the rights of the parties to the custody of the child sought in *habeas corpus* proceedings; and where, in our courts, the award has been in favor of a nonresident mother against the father of the child, the courts, properly established and having jurisdiction at the domicile of the mother, may further hear and determine the matter touching the care and control of the child on such changed conditions, properly established, that would require it.

HABEAS CORPUS to determine the right of present custody and control of Mary Virginia Means, an infant 5 years and 8 months old, heard

before *Harding, J.*, by consent, at county courthouse in the city of Charlotte on 17 September, 1918.

The petitioner in the cause is Mary A. Means, the mother of the child, resident in Auburn, R. I., and the respondents are Frank H. Means, the father, and the mother and sisters of the respondent, with whom the child is now residing at their home in Concord, placed there by the father.

On the hearing, and from the evidence submitted, his Honor made very full and pertinent findings of fact, and thereupon adjudged, in effect, that the child be awarded to the mother, she to enter into a bond in $1,000 to hold her at all times amenable to the orders of the court concerning her and to allow the respondents, at their expense, to bring the child to North Carolina from the home of the mother in Auburn, R. I., for three months in each year, from 1 June to 1 September, to reside with the mother and sister of the father, the respondents in such case to give a bond in $1,000 to obey the orders of the court and to return the child at the end of designated period, the respondents to bear the expense of the trip, etc.

From this judgment both sides appealed. Respondents excepted because the child was awarded to the mother and petitioner because the child was to be brought to North Carolina for the three months period.

A. B. Justice for petitioner Mary A. Means.
H. S. Williams and L. T. Hartsell for respondents.

HOKE, J. From the very full and pertinent findings of fact by his Honor it appears that in 1908 respondent F. H. Means took up his residence in Auburn, R. I., to pursue his occupation as electrician, and, continuing to reside there, in 1911 he was married to petitioner, and thereafter their child, Mary Virginia, was born, she being now 5 years and 8 months of age; that they have resided in Auburn since their marriage and until their separation in May of the present year, except about thirteen months in 1916 and 1917, when they came to North Carolina to live; that for some time during their stay in this State, respondent F. H. Means was habitually engaged in the unlawful sale of whiskey in North Carolina and fled the State by reason of that charge, the family returning to Auburn, R. I. Without going into the details of defendant's misconduct, which appear fully in the findings of the court, it further appears that for the past four or five years the respondent F. H. Means has been dissipated and engaged in unlawful practices, and after the return to Rhode Island from North Carolina the conduct of respondent, which had long been severe and cruel towards petitioner, became so unbearable and threatening that petitioner, justly

fearing for the safety of herself and child, was compelled to leave respondent and seek protection in the home of her father and mother, and has consulted attorneys of established repute with a view of instituting proceedings for a divorce in the Rhode Island courts.

With regard to the conditions and circumstances resultant from the misconduct of the respondent and the capacity and disposition of the respective parties towards the child and its proper care and custody, the findings of his Honor more directly relevant are as follows:

"That the petitioner, after leaving her husband as set out, obtained reputable employment, from which she derives a sufficient income to support herself and child; that since leaving her husband the petitioner has resided in the home of her mother, in the city of Auburn, R. I.

"15. That on or about 9 May, 1918, said Frank H. Means, after sending word to the petitioner that he was leaving the State of Rhode Island to accept a position in the State of Georgia, procured an automobile, went by the house of the petitioner's mother and secretly and forcibly entered the premises of the petitioner's mother and secretly and forcibly took the said Mary Virginia Means, daughter of the petitioner and respondent, Frank H. Means, from the home of the petitioner's mother without petitioner's knowledge and consent, and brought her to the State of North Carolina and delivered her into the custody of the respondent's mother, who resides in the town of Concord, N. C.

"16. That Frank H. Means, from 1908 until May of this year, has had his residence and domicile in the State of Rhode Island, with the exception of about thirteen months during 1916 and 1917, when he resided with the petitioner in North Carolina; (that the respondent Frank H. Means is not a resident of the State of North Carolina), but is now engaged in work in the State of West Virginia.

"17. That the petitioner is a woman of good character and is a fit person to have the custody of the said Mary Virginia Means, her daughter and the daughter of the respondent Frank H. Means; that she is living with her father and mother, who are people of good character and has sufficient ability and material resources to make the home of the petitioner and her daughter, Mary Virginia Means, comfortable, and that they are able to maintain, support and educate the said Mary Virginia Means, and that the said petitioner is able to maintain, support and educate her said daughter, Mary Virginia Means.

"18. (That the respondent Frank H. Means is not a resident of the State of North Carolina, and was not such resident at the time of the filing of the petition), nor at the time of the separation of the petitioner and the respondent Frank H. Means, nor at the time he took possession of the child of the respondent Frank H. Means and the petitioner and brought her to North Carolina.

"19. That Mary Virginia Means is a little girl about five years and eight months old, and that said Frank H. Means is not a suitable person to have the custody of said Mary Virginia Means; that the respondent Mrs. Coralie Means is the mother of said Frank H. Means, and is in comfortable financial circumstances and lives in the city of Concord, State of North Carolina; that Miss Catherine Means, Miss Myra Belle Means, and Mrs. Pauline Goodman are daughters of Mrs. Coralie Means and sisters of the respondent Frank H. Means; that each of them are ladies of good character; that Mrs. Coralie Means is a suitable person to have the custody of said child, and that her home is a suitable home in which said child may live; that Miss Catherine B. Means, Myra Belle Means, and Mrs. Pauline Goodman are fit persons to raise and maintain said child, so far as their intellectual, moral, social and financial ability is concerned."

There is further finding that for the last four months respondent has been employed in responsible work at Piedmont, West Virginia; that during that time he has been sober and industrious, and is receiving a salary of $81.60 per week.

On the question thus presented, it is the established principle in this State that parents have *prima facie* the right to the custody and control of their infant children, the father preferably, when it appears that he is fitted for the position and its responsibilities, though, as between the two, even when equally worthy, the mother may be allowed the superior claim when it is shown that the welfare of the child requires it. The doctrine and the basic reason for it and the authorities with us upon which it rests are set forth in the last case upon the subject as follows:

"It is fully recognized in this State that parents have *prima facie* the right of the custody and control of their infant children, the natural and substantive right not to be lightly denied or interfered with except when the good of the child clearly requires it. *In re Mercer Fain*, 172 N. C., 790; *In re Mary J. Jones*, 153 N. C., 312; *Newsome v. Bunch*, 144 N. C., 15; *Latham v. Ellis*, 116 N. C., 30.

In the case of Mary Jane Jones it is held that "This parental right should prevail whenever, being of good character, they have the capacity and disposition to care for and rear their children properly in the walk of life in which they are placed, a right growing out of the parents' duty to provide for their helpless offspring, not only enforcible as a police regulation, but grounded in the strongest and most enduring affections of the human heart. A substantial right, therefore, not to be forfeited or ignored except in some way or for some reason established or recognized by the law of the land."

It is also held with us in well-considered cases, and they are in accord with the rule now generally prevailing, that this right of the parents is

not universal and absolute; but even as between individuals, the same may be modified and disregarded when it is made to appear that the welfare of the child clearly requires it. *In re Alderman,* 157 N. C., 507; *In re Turner,* 151 N. C., 474; *In re Samuel Parker,* 144 N. C., 170.

In *Alderman's case, supra,* it was held that on proceedings in *habeas corpus* by a father for the possession of his child in the custody of the mother, the mother's possession of the child will not be disturbed if it appears that therein the physical and moral and spiritual welfare of the child will be the better preserved.

In *Turner's case* the opinion quotes with approval from *Chancellor Kent* to the effect "That the father, and on his death the mother, is generally entitled to the custody of their infant children, inasmuch as they are their natural protectors for maintenance and education, but the courts may, in their sound discretion and when the morals or safety or interests of the children strongly require, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere." And in the case of *Samuel Parker* it was said in a concurring opinion that in this country the disposition of the child rests in the sound legal discretion of the court, and it will be exercised as the best interests of the child may require, citing *Newsome v. Bunch,* 142 N. C., 19; Tiffany on Persons and Domestic Relations, p. 308; Shouler on Domestic Relations, sec. 240. And further: "The best interest of the child is being given more and more prominence in cases of this character, and on special facts has been held the paramount and controlling feature in well-considered decisions," citing *Bryan v. Lynn,* 104 Ind., 227; *In re Welch,* 74 N. Y., 299; *Kelsey v. Greene,* 69 Conn., 291; *Atkinson v. Downing,* 175 N. C., 244.

It appearing from the facts in evidence and the findings of his Honor that, in this instance, the father has thus far proved himself unfitted for the care and control of his infant daughter, and that the petitioner is in a position to give her a sheltered home; that she will cherish her with a mother's affection, and is well qualified by character, intelligence and disposition to have charge of her education and development, a correct application of these principles justifies and upholds the ruling that the child be given to the mother without modification and without requirement that she be brought to this State for three months in each and every year, and that any bond be given for that or other purpose.

In the case of *In re Alderman, supra,* the child was given to the mother because the best interest of the child required it, and, speaking to this question in 20 R. C. L., 601-602, it is well said: "The natural affection of the parents is ordinarily the best assurance of the child's welfare, and the object to be sought for the child is not so much the luxury and social advantages which more wealthy guardians might be

able to give it as the wholesome intellectual and moral atmosphere more likely to be found in its natural home."

It is objected to this position that, although the father may not be personally qualified for the care or custody of the child, yet having placed it with his mother and sisters, who are competent to care for it, the preferable right of the father should be recognized, but we cannot so hold. The requirement that the child be brought to North Carolina for three months in each year, at considerable expense, and working an entire change of control and environment is, at her impressionable age or at any time, a most trying experience, and while we have no doubt that she has at present a comfortable home with its paternal grandmother and aunts, and from the character and benevolent disposition of these good relatives we are well assured that they will do their best for her, this is not their burden, and we do not think it should be imposed upon them. Moreover, the arrangement is subject to be modified or entirely changed at any time at the will of the father, and in such case we are of opinion, as stated, that the child should be placed with the parent who can also give it a comfortable home and is qualified by character and disposition to rear it properly.

We were cited to decisions of our Court where a parent was prohibited from removing the child from the State, and it was contended that in no event should such removal be allowed without giving bond for its return then required. In *Page v. Page*, 166 N. C., 90, where an inhibition of this kind was adjudged, there was an action of divorce pending between the parties and where there was reason to believe that the merits of the controversy were with the resident parent. See *S. c.*, 161 N. C., 170. Even in case of proceedings pending, however, this is not an absolute or arbitrary principle and may be departed from when it is clearly manifest that the good of the child requires it. This was recognized in *Harris v. Harris,* 115 N. C., 587, a case also relied upon by respondent, and in which it was held, among other things, that "the court will not award the child to a nonresident mother if it does not appear that the child desires to go to her or that the father is not a proper person to have it, or that the child will not be benefited by the change," and in proceedings of this character and on the facts of this record it is eminently proper that the child should be allowed to go with the mother and abide in the home that she is ready to give it. True, that ordinarily the domicile of the father fixes that of his infant child, but where he has by his misconduct forced the mother to leave him, she is allowed to acquire an independent domicile of her own, and as to questions presented and involved in this hearing, such domicile should determine that of her infant child, awarded to her as her natural right. Indeed the home of the wife in Rhode Island being also the

matrimonial domicile it would seem that the courts of Rhode Island, in any aspect of the matter, have full jurisdiction of the subject and may well be trusted to do equal and exact justice between the parties. *Atherton v. Atherton,* 181 U. S., 155; *Ditson v. Ditson,* 4 R. I. 87; 9 R. C. L., 545, title, Domicile, sec. 8; *McGrew v. Mutual Life Ins. Co.,* 132 Cal., 85. In *Newsome v. Bunch,* 144 N. C., 15 (*S. c.,* 142 N. C., 19), the child was awarded to a nonresident father, who had shown that he was worthy and in every way qualified to care for it, and a like principle is approved and applied elsewhere in well-considered cases. *Ex Parte Davidge,* 72 S. C., 16; *Wood v. Wood,* 5 Paige Chan., 596; 29 Cyc., 1600.

It may be well to note that on a hearing of this kind the judgment is not intended to be a final determination of the rights of the parties touching the care and control of the child, but, on a change of conditions, properly established and in the courts of the mother's domicile or other courts having jurisdiction, the question may be further heard and determined. 29 Cyc., 1605, citing *McGouch v. McGouch,* 136 Ala., 170, and other cases.

On respondent's appeal, the judgment of the Superior Court is affirmed, and on petitioner's appeal same is modified in accordance with this opinion. The child being awarded to the mother here, the respondent F. H. Means is thereby relieved of that portion of the order requiring him to pay the expense of transferring the child to Rhode Island and return.

The costs of appeal and of the hearing will be taxed against respondents, that of the lower courts to be made out and judgment entered therefor by the clerk of the Superior Court of Mecklenburg County.

On respondent's appeal, affirmed.

On petitioner's appeal, modified.

ANNIE C. GRAHAM v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 30 October, 1918.)

1. Insurance—Principal and Agent—Local Agent—Implied Authority.

A local agent of an insurance company has no implied authority to bind the company to provisions or options not contained in the policy as afterwards written and properly issued and accepted by the insured.

2. Insurance—Prior Transactions—Merger.

Transactions leading up to the issuance of a policy of life insurance merge therein upon its issuance and acceptance by the insured, and, under our statute, the terms and conditions of the insurance must be plainly

expressed in the policy as issued. Chapter 54, Public Laws of 1899; Pell's Revisal, sec. 4775.

3. **Same—Principal and Agent—Local Agent—Options— Estimates— Policy Contracts.**

Estimates of the value of options made up by the local agent of a life insurance company, filled in by him on a printed form furnished by the company, unknown to or unauthorized by its proper officials, or included within the terms, or referred to or attached to the policy thereafter issued, are not binding as a part of the policy contract.

4. **Insurance— Reformation of Contracts— Equity — Principal and Agent— Local Agents.**

Evidence tending to show that the local agent of a life insurance company had furnished the insured his estimate of value of certain options contained in the policy thereafter issued by filling out spaces left in printed forms sent out by the company, and without evidence that its proper officials either knew of or ratified them, is not sufficient in a suit to reform the policy for mutual mistake or fraud.

5. **Insurance—Principal and Agent—Local Agent—Options—Policy Contract —Statutes.**

The exercise of an option given by a mutual life insurance company to one of its policyholders of greater value than that given to the others is an illegal and void discrimination, prohibited by our statute and general principles of law.

6. **Insurance—Reformation of Contracts—Equity—Laches.**

Where the plaintiff has accepted a policy of life insurance and kept it for fifteen years without objection, she has lost, by her laches, the equitable right to have it reformed for fraud or mistake.

CLARK, C. J., did not sit in this case.

ACTION tried before *Bond, J.*, at May Term, 1918, of ORANGE.

The court, at conclusion of the evidence, rendered the following judgment:

"This cause coming on to be heard, all parties being before the court, upon consideration of the pleadings and the relief demanded, it appears the defendant company now and at all times had admitted the rights of the plaintiff to be exactly as provided in the policy issued, and plaintiff claims the right to certain additional relief not provided for by the terms of the written policy, but based on a paper not attached to or referred to in said policy, but which paper was sent to plaintiff's father 5 November, 1901, by agent of company.

"The court is of opinion that the action is one brought to reform a written contract by inserting in it additional provisions alleged to have been omitted by mutual mistake of the parties.

"At the close of the plaintiff's evidence, defendant moves for judgment as of nonsuit. After considering the evidence and argument, the court is of the opinion that there is no evidence tending to prove any omission

in the policy of any provision by mistake of the parties, and is further of the opinion that if any such mistake had been made, the action to reform said policy, if any cause of action existed, is barred by the statute of limitations.

"It is further adjudged, ordered and decreed that the motion by the defendant for judgment as of nonsuit be and the same is hereby allowed and sustained, and judgment as of nonsuit is hereby entered as to plaintiff's action."

Plaintiff appealed.

V. S. Bryant, John W. Graham, P. C. Graham, and A. H. Graham for plaintiff.

James M. Pou and S. M. Gattie for defendant.

BROWN, J. The basis of this action is an insurance policy, denominated a guaranteed, compound interest, gold bond, limited payment, dated 6 November, 1901, maturing in fifteen years, and issued upon the life of plaintiff. The specific relief demanded is "That the guaranteed cash value of the policy may be surrendered to purchase a paid-up participating gold-coin policy for $10,000, and that the company pay thereon an annuity for her life from 6 November, 1915, equal to 3 per cent, or $300, and that the surplus, as apportioned, be paid in gold coin; that if necessary, the policy be reformed to include these guarantees, which were the foundation of the contract of insurance and omitted from the policy because of mutual mistake."

The defendant denies that the contract contains any guarantee of a participating gold-coin policy for ten thousand dollars, together with a further guarantee of a life annuity of 3 per cent, or three hundred dollars thereon, and avers its readiness at all times to discharge the conditions of the policy as written.

It is admitted that the policy dated 6 November, 1901, contains no such provision, but the plaintiff relies upon a printed paper (Exhibit 2) with figures in writing made out by the local agent of defendant at Durham, Mrs. Annie C. Wall. This paper has no date, but was enclosed in a personal letter to Major John W. Graham, plaintiff's father, dated and postmarked 5 November, 1901, and addressed to Hillsboro, N. C. The paper was never seen or signed in writing by any officer of the defendant. When the policy of insurance was received by Major Graham he filed the paper with it, and there it has remained until the fifteen years expired. There is no evidence that during all that period any officer or general agent of the defendant had any knowledge of it.

The policy itself is duly signed in writing by the president and secretary of the defendant, but the paper is not signed in writing by any

one. It has the name of W. J. Easton, secretary, printed at bottom in ordinary type and of Richard A. McCurdy, president, in large print across the top. On the back of it there are the words "Illustrations of options," and then follows six options with figures as to how they would "pan out." All the figures were made by Mrs. Wall. On the back appears the following in red ink: "It is understood by the holder hereof that the figures inserted in the example as indicating former (surplus) results are for the purpose of illustration only. They are adapted from the experience of the company in the past and are not pledges of future settlements. All that the company guarantees in respect to the surplus on this policy is that it will award the amount actually earned, be it more or less."

1. We are of opinion that upon the evidence the paper constitutes no part of the insurance contract.

It is not referred to in the policy and was not even attached to it, and there is no evidence that it was ever seen or ratified by any officer of the defendant. *Stone's case,* 34 N. J. Law, 371; *Hill v. Ins. Co.*, 146 Iowa; *Untermyer v. Ins. Co.,* 113 N. Y. Supp., 221.

There is no evidence that the local agent had the authority to bind the company by it, assuming that it is contractual in form, which it is not. It appears on its face to be an illustration of what the insured may reasonably expect the several options will yield as figured out by Mrs. Wall. No one claims or even hints that Mrs. Wall knowingly perpetrated a fraud, but it is evident she made an honest mistake in her calculations. She was furnished with the usual insurance literature, and among which was a lot of printed forms of Exhibit No. 2. She was also furnished a rate book, and from this rate book she would fill in illustrations and examples under the guarantees. It was impossible to furnish printed literature with the amounts all printed. The policies varied in amount, and the values varied with the ages of the insured. The local agent in canvassing for insurance would take the literature and fill in from the rate book the figures applicable to the amount and age of the person canvassed.

Mrs. Wall had no authority to bind the defendant by this paper even if it were a contract in form. She was a mere local soliciting agent with no power to bind her principal. Such agency is one of limited powers, as shown by the agency contract between Mrs. Wall and defendant. 17 Cyc., 475 (3); *Gwynn v. Setzer,* 48 N. C., 383; *McFarland v. Patton,* 4 N. C., 421.

The plaintiff has failed to show any authority upon part of Mrs. Wall to make the guarantees claimed. As is said by *Ruffin, J.*, in *Biggs v. Ins. Co.*, 88 N. C., 141: "Where one deals with an agent it behooves him to ascertain correctly the extent of his authority and power to con-

tract. Under any other rule, every principal would be at the mercy of his agent, however careful he might limit his authority." *Bank v. Hay*, 143 N. C., 326; *Floars v. Ins. Co.*, 144 N. C., 232.

Assuming that Mrs. Wall undertook to make a definite contract with plaintiff when she filled out this printed form and mailed it to Major Graham, it was prior to the issuing of the policy by the officers of defendant and it merged into it. The written policy accepted by plaintiff stands as embodying the contract, and the rights of the parties must be determined by its terms until the contract is reformed by the Court. *Floars v. Ins. Co., supra.*

It would seem that plaintiff's contention is in the teeth of the statute law in this State in force at the time the policy was issued. Chapter 54, Public Laws of 1899, was in force at and before this policy of insurance was issued. It provides that no life insurance company, or agent thereof, could make any contract of insurance or any agreement as to any contract of insurance other than as it were plainly expressed in the policy. This statute has continued since 1899, and is now section 4775 of Pell's Revisal.

The case of *Gwaltney v. Ins. Co.*, 132 N. C., 925, has no application, as that was decided upon a policy of insurance issued prior to the act, and also differs from this case, as here there is no allegation of fraud.

2. We are also of opinion that there is no ground disclosed upon which plaintiff can have the policy reformed.

This could only be decreed upon clear, cogent and convincing proof that the paper (Exhibit 2) was agreed upon between the authoritative officers and plaintiff; that it was omitted from the policy by mutual mistake or by the fraud of defendant and the mistake of plaintiff. This is elementary. There is nothing in the evidence that even gives color to such contention. The mistake of the soliciting agent which the defendant did not authorize or ratify cannot be imputed to it. *Floars v. Ins. Co., supra.*

The policy was delivered to plaintiff's father, an able and distinguished lawyer, who was plaintiff's agent, who already was in possession of Exhibit 2, a paper which no officer of the defendant ever saw. By reading the policy, he could readily discover that no such provision was in it, and that the character of the policy was incompatible with any certain assured amount of dividend payable to the insured at the termination of the accumulative period. It was his duty to return it to defendant at once and decline to accept it. Instead of doing so, he kept the policy for fifteen years without taking any action to enforce plaintiff's supposed rights. Plaintiff has slept on her rights, if she had any. *Upton v. Triblecock*, 91 U. S., 45; *Floars v. Ins. Co.*, 144 N. C., 241.

There is another very cogent reason why Exhibit 2 cannot be incorporated in the policy. There are doubtless many policies of the character of the one sought to be reformed extant and in force in this State. To reform this policy by decreeing Exhibit 2 to be a part of it would give plaintiff an undue advantage over others holding similar policies and would be an illegal discrimination in her favor at variance with our statutes as well as the general principles of law.

The defendant is a mutual company and is forbidden to discriminate among its policyholders, and any agreement which would result in the payment of larger proportionate dividends to one of its policyholders than to others in the same class would be illegal and void. *Orange v. Penn. Mutual Ins. Co.,* 235 Penn. St., 321, and cases cited.

The judgment is

Affirmed.

SOUTHERN NATIONAL BANK v. GERMANIA MANUFACTURING COMPANY AND ATLANTIC TRUST AND BANKING COMPANY, TRUSTEE.

(Filed 30 October, 1918.)

1. Trusts and Trustees—Deeds and Conveyances—Mortgages—Corporations—Receivers—Courts.

Where a corporation is insolvent has ceased to do business for a term of years and is permanently closed down, with the property constantly depreciating and inadequate to pay its bonded debt, a receiver will be appointed, at the suit of the bondholders, with an order of sale; and where the bonds are held by one person or corporation, provisions in the deed of trust requiring a concurrence in writing of a certain number of bondholders, or inserted merely for the protection or direction of the trustee or to safeguard the interest of minority bondholders, are immaterial.

2. Same—Equity—Sales.

The equity jurisdiction of our courts over mortgages and deed in trust securing a debt cannot be taken away or injuriously limited by any agreement therein of the parties as to sale and redemption, the power of sale in the instrument being regarded as a cumulative remedy, and the provisions of the instrument are given consideration and effect only in the adjustment of the equities involved.

ACTION tried at chambers, before *Lyon, J.,* at April Term, 1918, of NEW HANOVER, upon complaint and demurrer interposed by defendant Trust Company. No answer or demurrer was filed by the Germania Manufacturing Company. The judge overruled the demurrer and, no application being made for time to answer, appointed a receiver and entered a decree of foreclosure. Defendant appealed.

John D. Bellamy & Son for plaintiff.
Robert Ruark for defendants.

BROWN, J. The relief sought is for the appointment of a receiver and foreclosure of a deed of trust made by defendant Germania Manufacturing Company to Atlantic Trust and Banking Company to secure an issue of bonds of $50,000.

The grounds for the appointment of a receiver are:

1. Insolvency of the company.

2. Had ceased to do business for a term of years and had closed down permanently.

3. That the mortgaged property was greatly inadequate to pay the debt and constantly depreciating.

The court found these facts to be true, appointed a receiver, and directed a foreclosure by the receiver as a commissioner.

The Manufacturing Company did not answer or demur. The Trust Company demurred on ground that the action could not be maintained because the complaint failed to set out that the provisions of the deed in trust in regard to foreclosure had been complied with.

There are certain provisions in the deed that require a concurrence of one-third of the bondholders in requesting a foreclosure, which must be in writing, otherwise the trustee is not compelled to act. The bondholders must also indemnify the trustee as to expenses, etc. It is needless to set out in full all of these provisions. They were evidently inserted in the deed for the protection and direction of the trustee and to safeguard the minority bondholders from a sacrifice of the property. As it is alleged in the complaint that plaintiff is the owner of the entire issue of bonds, some of these provisions have now no force.

The Courts have sustained provisions in deeds in trust restricting the right of one bondholder to sue for foreclosure upon default of the corporation, and requiring the concurrence of a certain number of bondholders, and also provisions for the protection of the trustees, and the like. But none of those protective provisions intended to safeguard all bondholders can be brought in question here, as plaintiffs owns all the bonds and is not asking the aid of the trustee, but is seeking relief through the courts. There is no provision in the deed that undertakes to deprive plaintiff of such right, and if there was it would be void.

Courts of equity have inherent original jurisdiction over the subject of mortgages and deeds in trust securing a debt, both for the foreclosure and redemption of them, and such jurisdiction cannot be taken away or injuriously limited by any agreements of the parties embodied in the instrument. This is substantially the principle of law laid down by text-writers and Courts. 2 Jones on Mortgages, sec. 1443; *Guaranty*

Trust Co. v. R. R. Co., 139 U. S., 137; *Reinhardt v. Tel. Co.*, 71 N. J. Eq., 77.

Such provisions are regarded as an attempt to contract away the established legal remedies which every man is entitled to. 3 Cook on Corp., sec. 804.

The power of sale is said by Jones, sec. 1773, to be merely a cumulative remedy and does not exclude the jurisdiction of the Courts. This is the view taken by our own Court in *McLarty v. Urquhart*, 153 N. C., 339, and in *Jones v. Williams*, 155 N. C., 179.

In the latter case *Mr. Justice Walker* quotes with approval what is said in *McLarty v. Urquhart* and adds: "The Court acts under its general equity jurisdiction and proceeds to grant relief irrespective of the stipulations contained in the power of sale. It pursues its own course and practice without any restraint by reason of the power of sale contained in the deed, so as to administer the rights of the parties according to law and its own equitable procedure, acting under its own powers and jurisdiction and not by virtue of any contractual power given in the mortgage or deed of trust."

While the courts will not allow their jurisdiction to be taken away or curtailed by contract, they all recognize the right of bondholders to agree among themselves (and to embody such agreement in the instrument) upon which conditions the right of foreclosure may be exercised by an individual bondholder. Such provisions are deemed *stricti juris*, but are allowed and reasonably construed in view of the nature of the security and the interest of the bondholders as a class. They do not oust the jurisdiction of the courts, but are merely the imposition of certain conditions upon each bondholder in respect to his right to seek foreclosure. Such stipulations are valuable sometimes in preventing a sacrifice of the property and the destruction of the corporation. *Seibert v. Minn. & St. L. R. R.*, 20 L. R. A., 536, and notes.

No answer having been filed, and as the demurrer concedes the truth of the allegations of the verified complaint, the right of plaintiff to have a receiver appointed is manifest.

The judgment of the Superior Court is

Affirmed.

KATE STALLINGS v. BELLE WALKER.

(Filed 30 October, 1918.)

1. **Tenants in Common—Partition—Parol Agreement.**

A parol partition of lands by tenants in common is invalid unless the title is established by sufficient adverse possession under the statutes of limitation.

2. **Tenants in Common — Partition — Deeds and Conveyances — Conditional Execution—Clerks of Court.**

Where a married woman seeks to partition lands as tenant in common, and the defense is interposed that the lands had been formerly divided by interchangeable deeds, and the cause has been transferred to the civil issue trial docket, and upon issues raised it has been determined by the jury upon sufficient evidence, with the burden of proof on the plaintiff, that she had signed her deed upon condition that her husband should give his written assent, which he did not do, and the deed had not been delivered: *Held*, the deed was inoperative and the cause was properly remanded to the clerk to proceed with before him.

3. **Tenants in Common—Partition—Title.**

Proceedings to partition lands, unless the title has been made an issue, have only the effect of apportioning the lands among the tenants under their common title.

4. **Husband and Wife—Deeds and Conveyances—Written Consent—Constitutional Law.**

Article X, section 6, of our Constitution makes the written consent of the husband necessary to the wife's conveyance of her lands.

ALLEN, J., concurring in result.

APPEAL by defendant from *Shaw, J.*, at February Term, 1918, of ROCKINGHAM.

This is a petition for partition, certified to the court at term and tried upon issues before a jury. From the verdict and judgment the defendant appealed.

P. W. Glidewell and W. M. Hendren for plaintiff.
W. R. Dalton, J. R. Joyce, and Manning & Kitchin for defendant.

CLARK, C. J. This is a petition for partition transferred to the court at term upon issues raised by the answer. D. G. Flack died intestate at the age of 91, leaving two children, the plaintiff and defendant and two tracts of land, on one of which (157 acres) the plaintiff resided, and the other and more valuable tract (the "home place"), containing 284 acres, where the defendant, a widow, resided with her father.

There was evidence of a request by the father that his two daughters should make an equal division, allotting to the plaintiff enough of the

home tract which, if added to the tract on which she resided, would make equality. There is evidence that in the partition alleged by defendant to have been made after their father's death there is nearly $7,000 more in value allotted to the defendant than to the plaintiff. It was also in evidence that the plaintiff executed a deed to the defendant for her share in such division, and that the defendant executed a deed to the plaintiff. The plaintiff, in her reply, alleges, however, and offered proof, that when she signed the deed to the defendant it lacked the "written assent of her husband," and that there was a parol agreement that it was not to take effect and be recorded until the husband had agreed to the equality of the partition and given his written assent. It is also alleged and in evidence that the deed by the defendant to the plaintiff was never delivered to nor accepted by the plaintiff, but was recorded without such delivery at the instance of the defendant.

Upon the issues submitted to the jury upon the pleadings the jury found on the first four issues that there was a parol agreement between the plaintiff and defendant to partition the lands left by their father, but that said lands have not been divided pursuant to said agreement, though both parties have been in sole and exclusive possession of their respective shares as claimed by the defendant, and that the parties did not intend thereby to ratify said partition. A parol partition is invalid unless followed by possession sufficient under the statute of limitations. *Tuttle v. Warren,* 153 N. C., 461.

The fifth issue is as follows: "Was the paper-writing from Mrs. Stallings to Mrs. Walker dated 17 January, 1913, purporting to be a deed for lands now claimed by defendant, signed, acknowledged and delivered upon the understanding and conditions alleged in the reply?" To this issue the jury responded "Yes."

The reply alleged that said paper-writing by plaintiff to defendant purporting to convey to her the land which the defendant claims was absolutely void and of no binding effect upon her because her husband did not join in such deed nor authorize the execution thereof; that it was executed by her in his absence and upon an agreement that it should be of no effect till it should receive the "written assent" of her husband; that the survey for a division was made by a surveyor in the employment of the son of the defendant, and that the deeds were drawn by a lawyer in his employment in the absence of the plaintiff's husband and without consulting her, and that the division, as made, is inequitable and would result in the loss of 65 acres of land to the plaintiff.

The sixth issue, finding that the plaintiff and defendant are tenants in common of the two tracts of land, each owning an undivided one-half interest therein, and that the plaintiff is entitled to have actual partition

of land followed as a matter of law, and the court remanded the cause to the clerk to be proceeded with that such partition shall be made.

While there are numerous exceptions, the controversy, as tried, is almost entirely one of fact, and the court properly instructed the jury as follows: "The fifth issue is, 'Was the paper-writing from Mrs. Stallings to Mrs. Walker signed, acknowledged and delivered upon the understanding and condition alleged in the reply?' Now the plaintiff alleges that it was, gentlemen of the jury, and the burden is on the plaintiff, Mrs. Stallings, to show by the greater weight of the evidence that that is true; and if she has so shown you will answer that issue 'Yes,' otherwise you will answer it 'No.'"

The court further charged the jury: "If you find from the greater weight of the evidence that she signed that deed upon that condition, with the agreement that it was not to be effective if her husband did not sign it, it would be your duty to answer the fifth issue 'Yes.'"

The defendant contends that where there is a partition of the realty by consent, and the tenants mutually convey by deed to each other, "no title passes, but it is simply a destruction of the unity of possession." *Harrison v. Ray,* 108 N. C., 215, which was affirmed, *Harrington v. Rawls,* 131 N. C., 41, which held that "A deed of partition conveys no title, but is simply a severance of the unity of possession." To same purport, *Jones v. Myatt,* 153 N. C., 230, holds, "It is settled by decisions of this Court that actual partition merely designates the share of the tenant in common and allots it to him in severalty. It does not create or manufacture any title," citing *Carson v. Carson,* 122 N. C., 645; *Williams v. Lewis,* 100 N. C., 142.

Weston v. Lumber Co., 162 N. C., 165, cites the above cases and holds that where the title to land is not in controversy the effect of a partition is to designate and allot to each tenant his share in severalty, but does not create any title which they did not have before. The defendant contends from this that therefore it was not necessary to the validity of the deed from Mrs. Stallings that her husband should give his written assent to the deed conveying to Mrs. Walker the designated interest in severalty.

It is true that the husband, under our Constitution, Art. X, sec. 6, has no interest as husband in his wife's property, real or personal. The provision that he must give his written assent to conveyances by her of realty is the sole survival in our Constitution of the ancient idea that a wife must be under the guardianship and control of her husband and is incompetent to transact business. This requirement in our Constitution is omitted in nearly all the other State constitutions. It is not based upon his having any interest in his wife's land, nor on his having a vested interest therein at her death, for she has full authority to

devise the same without his consent and deprive him of any interest as tenant by the curtesy. Accordingly, it is held that while his assent must be in writing, it need not be by deed, for he has nothing to convey; that his joining with her in the instrument is sufficient. *Jones v. Craigmiles,* 114 N. C., 613, and cases there cited, and that his signing the instrument merely as a witness is a sufficient "written assent." *Jennings v. Hinton,* 126 N. C., 48; or a letter written by him is sufficient. *Brinkley v. Ballance,* 126 N. C., 393.

The husband's "written assent," therefore, is not based upon his having any interest in the property or in the title which he must join in conveying. The written assent is required not to aid in the conveyance of the property nor of the title to property in which he has no interest, but as a requisite to the validity of a conveyance by the wife. There has not been any written assent by the husband, and, therefore, a conveyance by the plaintiff to the defendant of the share claimed by the latter would be invalid for the lack of the written assent required by the Constitution. While such instrument of partition, if otherwise valid, would not be a conveyance of any title, it is a practical "conveyance" by the plaintiff to the defendant, as appears by the evidence in this case, of $7,000 more of the property than was a just and equal share to which she was entitled.

While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written assent, without which her conveyances of realty are invalid. On the other hand, the wife has no veto power over the conveyances by the husband of his realty, though she has an interest therein. A deed by him of his property is valid without her joinder, subject only to her contingent right of dower should she survive him.

However, the court submitted to the jury the issue whether the deed was delivered by Mrs. Stallings upon an express condition, agreed to by Mrs. Walker, that it was to be void and of no effect unless concurred in "by the written assent of her husband," and the jury have found that this was true. Upon this ground the judgment entered was correct.

No error.

ALLEN, J., concurring in result: I think the judgment of the Court, is correct, but I do not agree to the statement that the assent of the husband to the conveyance of the land of the wife "need not be by deed." It is expressly held otherwise in *Ferguson v. Kinsland,* 93 N. C., 337; *Jackson v. Beard,* 162 N. C., 109; *Warren v. Dail,* 170 N. C., 406; *Graves v. Johnson,* 172 N. C., 178; *Hensley v. Blankinship,* 174 N. C., 760, and the cases cited in the opinion do not support the proposition, as none of them have any relation to a deed for land. The subject-

matter of *Jones v. Craigmiles* was a note; of *Jennings v. Hinton,* an insurance policy; and of *Brinkley v. Ballance,* merchandise sold on a written order.

W. B. TAYLOR AND J. P. TAYLOR v. THOMAS V. EDMUNDS.

(Filed 30 October, 1918.)

1. Deeds and Conveyances—Contracts—Fraud or Mistake—Evidence—Partnership—Principal and Agent.

Where there is evidence tending to show that two partners, acting as the sales agent for lands, were to receive the balance of the land as compensation after a part thereof had been sold to other parties in various parcels; that they knowingly and intentionally procured the owner to make a deed to them of a strip of adjoining land not included in the contract, under circumstances tending to show that he signed the deed, among several others submitted at the time, relying upon the representation of one of the partners that it would close the deal, and without knowing at the time that the land conveyed was not included in the agency contract: *Held*, in the owner's suit to set aside the deed for fraud and mistake against one of the partners, that admissions in the evidence and pleadings of the other partner that he had reconveyed his part of the *locus in quo* to the owner without consideration are competent, and upon all of the evidence the case was properly submitted to the jury.

2. Deeds and Conveyances—Contracts—Fraud or Mistake—Evidence.

Upon evidence tending to show that the plaintiff was induced by the misrepresentations of his selling agent of lands, knowingly and intentionally made, to execute to the latter a deed to lands for compensation for his services not covered by the selling contract; that the agency covered many like transactions and the deed in question was sandwiched between other deeds handed the owner by the agent at the same time, with the remark that they completed the contract; that the owner signed them all without knowledge that he had conveyed land not therein embraced: *Held*, as between the immediate parties, evidence of fraud in the factum, there being no consideration; and notwithstanding the owner was an educated man and capable of informing himself at the time, it was sufficient to take the case to the jury upon the issue of fraud and mistake, in the owner's suit to set the deed aside.

3. Contracts, Written—Deeds and Conveyances—Parol Agreements—Reformation.

A written contract concerning lands may not be reformed for mistake of the parties to incorporate therein a prior agreement by parol, unless it is shown that the parol agreement was a part thereof and fraudulently or unintentionally omitted by the parties or their draftsman.

4. Limitation of Actions—Deeds and Conveyances—Contracts—Reformation Mistake—Pleadings—Answer—Burden of Proof.

Where the defendant in an action to set aside a deed to lands for fraud and mistake alleges, as the basis of a counterclaim, that the deed should

be reformed to include a parol agreement by the plaintiff, the owner, to build houses of a certain class to enhance the value of the property, the plea of the statute of limitations put the burden upon the defendant, in the cross-action, to show that the statute of limitation, Revisal, sec. 395 (9), had not barred his right, by a lapse of more than three years from the time he discovered the mistake to the time he had filed his pleading, and in failing to introduce such evidence he is concluded as a matter of law.

APPEAL by defendant from *Shaw, J.*, at January Term, 1918, of FORSYTH.

This is an action to set aside a deed upon the ground of fraud and mistake. The jury having found the issues in favor of the plaintiffs, the defendant excepted and appealed from the judgment thereon.

Lindsay Patterson, Jones & Clement, and Craige & Vogler for plaintiffs.

Fred M. Parrish and A. E. Holton for defendant.

CLARK, C. J. The plaintiffs conveyed to Edmunds and Jerome the property in controversy, which is a strip 10 feet wide and 610 feet long, and allege that the deed was executed through mistake on their part and fraud or mistake on the part of the defendant Edmunds. They further allege that the defendant Edmunds designedly sent the deed for said strip to the plaintiff together with deeds for property covered by the written agreement, which written agreement did not include this strip, for the purpose of having it executed along with the other deeds at the same time, and thus fraudulently obtain title to said strip.

T. V. Edmunds and W. G. Jerome were partners, acting as selling agents under a contract with plaintiffs executed 22 March, 1912, according to the terms of which whenever Edmunds and Jerome should have sold $50,000 worth of the property described in said contract, the balance of the property therein named should be conveyed by plaintiffs to them, or to whomsoever they might designate. Jerome testified that after they had sold that amount, they divided the remaining unsold lots and had deeds prepared for the purpose of obtaining title; that "he and the defendant Edmunds decided that they ought to have the property in controversy (*i. e.*, this strip, 10 feet wide and 610 feet long, lying alongside of the other property); that they knew that this property was not included in the contract, but that the defendant Edmunds told him to have a deed prepared which would convey to each of them an undivided one-half interest therein, and that they would *take a chance* on the plaintiffs executing it." In pursuance of this direction from Edmunds, Jerome says he submitted to the plaintiffs for execution the deed for this strip sandwiched in between three other deeds and the contract,

and all of said deeds were duly executed, and when he carried the deed to the property in controversy back to Edmunds, Edmunds made an exclamation of surprise, and stated "that he did not think Taylor Bros. would execute it."

Assignments of error 1 and 2 are to the admission of the testimony of W. G. Jerome, to whom jointly with the defendant, T. V. Edmunds, the deed for said strip of land was executed by the plaintiffs; that without consideration, he had reconveyed his half interest in the property in controversy and the admission in evidence of his deed of reconveyance.

This was competent in corroboration. "Actions speak louder than words," and the best proof possible in corroboration of Jerome's statement of the transaction is the fact that he voluntarily reconveyed the property to the grantors. He was a party to the alleged fraudulent transfer of the property from the plaintiffs to himself and Edmunds. Why should he voluntarily reconvey if he thought himself entitled to the property?

The motion to nonsuit was properly denied. It was in evidence that the plaintiffs had had numerous dealings with Edmunds and Jerome, covering a long period of time, and had executed for them deeds to property amounting to more than $50,000; that the plaintiffs knew that the strip of land in controversy was not included in the contract, and that the defendant also knew that this strip of land was not included therein. There is also the above evidence that for the purpose of obtaining said strip the defendant had a deed prepared embracing it and sent to the plaintiffs, sandwiched in with three other deeds and a contract, by the witness W. G. Jerome, who said when he delivered these papers, "Here are the papers to wind up that property."

It is true, as the defendant contends, the plaintiffs were educated men, and if they executed this deed merely by reason of their failure to read the same, they are bound by their voluntary act, and should not recover. *Dellinger v. Gillespie,* 118 N. C., 737. This is well-settled law, but the evidence in this case tended to show, and does show (as the jury find), that because of the confidential relationship existing between themselves and the defendant, covering a long course of dealings, during which they had executed a large number of deeds sent them by Edmunds and Jerome for lots sold by them, the plaintiffs had a right to assume that he would submit to them for execution deeds only for lands embraced in the contract, and that they were misled by the manner of submitting this deed to them for execution, sandwiched in with other deeds for property embraced in the contract of 22 March, 1912, and especially that they were misled by the false statement of the defendant's agent and cograntee, W. G. Jerome, that "these papers wind up that property."

By that the plaintiffs reasonably understood that these deeds, like all the previous ones, were for property embraced in said contract.

"The principle relied on by the defendant that when the means of knowledge were at hand and equally available to both parties, the party complaining must show that he made due inquiry is subject to much qualification (20 Cyc., 32, 33), and does not apply where there is actual, intentional fraud or misleading statements calculated to prevent inquiry and made under circumstances where they were calculated to allay suspicion." *Machine Co. v. Bullock,* 161 N. C., 1.

The mere fact that a grantor who can read and write signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time and reasonably relied on by him. *Gray v. Jenkins,* 151 N. C., 81, and cases there cited; *May v. Loomis,* 140 N. C., 350; *Griffin v. Lumber Co., ib.,* 514; *Floars v. Ins. Co.,* 144 N. C., 232; *Gwaltney v. Assurance Society,* 132 N. C., 925. Indeed, the principle is well settled that when there is fraud and misrepresentation in procuring the execution of the instrument the want of due care by the other party is no defense. Besides, this deed was made without any consideration for the conveyance of said property.

These circumstances were sufficient evidence to go to the jury to sustain the allegation of "fraud in the factum." The jury responded to the second issue that "the deed to the strip of land in question was executed by the mistake of the plaintiffs and by fraud and mistake on the part of the defendant Edmunds, as alleged by the plaintiffs." There was evidence to support such finding.

The jury found in response to the first issue that this strip of land, covered by the deed in question, but which was not in the paper-writing executed by the plaintiffs to Edmunds and Jerome on 22 March, 1912, was not left out of said contract by the mutual mistake of the parties or the mistake of the draftsman, as alleged by the defendant. The rights of third parties have not become involved, as the undivided half interest in the property in question is still held by the original grantee, T. V. Edmunds, the defendant in this action.

The contract of 22 March, 1912, stipulated that the plaintiffs were to build on each of three lots a dwelling-house of not less than six rooms. It is admitted that the plaintiff built the six-room houses as provided in the contract. There was no provision as to the style of the house, nor the cost.

The defendant in his amended answer setting up a counterclaim

alleged that there was an oral agreement prior to the above written contract, by which the plaintiffs agreed "to erect three houses of such a character as to enhance the value of said property and such as to induce a high-class residential section," and it is further alleged that this prior oral agreement was omitted from the written contract by the mutual mistake and oversight of the parties and the draftsman, and asked that the written contract be reformed so as to embrace such provision. The plaintiffs denied the existence of such prior oral agreement, and it was not shown on the trial. On the contrary, Jerome, the defendant's partner, testified, "We had no contract that I know of, except the contract of 22 March, 1912."

There was no testimony introduced as to when the defendant discovered that this alleged prior oral agreement was left out of the written contract, and in the issues submitted to the court by the defendant there was no issue as to such alleged prior agreement. In view of the written contract, parol testimony was incompetent to show prior negotiations unless it had been shown that such agreement was a part of the contract of 22 March, 1912, and was omitted by mistake.

The court properly dismissed the defendants' counterclaim on this allegation, because it was barred by the statute of limitations. Revisal, 395 (9), provides that in an action for relief on the ground of fraud or mistake, "The cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake." The plea of the statute of limitations devolved upon the defendant, in his cross-action, the burden of showing such discovery. The statute begins to run from the discovery of the mistake and not from the breach of the contract. *Stubbs v. Motz,* 113 N. C., 458; *Modlin v. R. R.,* 145 N. C., 227; *Tuttle v. Tuttle,* 146 N. C., 484.

The written contract was made 22 March, 1912. This action was begun more than four years thereafter, on 12 May, 1916. In *Ely v. Early,* 94 N. C., 1, it was held that the statute runs to the time of filing the amended answer, setting up the counterclaim, which in this case was filed 11 January, 1918, or nearly six years afterwards. There being no testimony when the defendant discovered that the alleged prior agreement was omitted from the written contract, the court properly held that the counterclaim to reform the written contract of 22 March, 1912, by inserting such alleged prior agreement, if any, was barred by the three years statute of limitations.

No error.

THE MAR-HOF COMPANY, INC. v. ROSENBACKER ET AL.

(Filed 6 November, 1918.)

1. **Contracts—Restraint of Trade, Reasonable—Public Interests.**

Unless in violation of express and definite statutory provision, agreements in partial restraint of trade will be upheld when they are founded on valuable considerations and reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.

2. **Same.**

Transactions involving the sale and disposition of a business trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value.

3. **Same—Statutes.**

The common-law doctrine in its application to stipulations in restraint of trade, given them effect in certain instances as reasonable and not against public interests, is applicable to the interpretation of statutes on the subject where their terms are sufficiently indefinite to permit of interpretation.

4. **Same—Intent—Vendor and Purchaser.**

Our statute on the subject, preventing an agreement or understanding of the parties engaged in buying or selling anything of value, made "with the intent of preventing competition," by making the invalidity of the agreement depend upon the intent of the parties and not arbitrarily on the effect of the agreement, is sufficiently indefinite to permit of construction and disclose the legislative purpose to subject such agreements to the standard of their reasonableness, to be determined by the character of the transaction and the purpose of the parties, as disclosed in the contract and the facts and circumstances permissible and relevant to its correct interpretation. Laws of 1913, ch. 41; Greg. Supp., sec. 3028, sec. 5, sub-sec. f.

5. **Same—Breach of Contract—Damages—Counterclaim.**

A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of chapter 41, Laws of 1913; and in the vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect.

ACTION heard on appeal from Forsyth County Court and on demurrer to defendant's counterclaim before *Lane, J.*, at September Term, 1918, of FORSYTH.

The action was to recover the sum of $414.10 for goods sold and delivered.

Defendant answered, admitting the amount due, subject to some inconsiderable reductions specified, and further set up a counterclaim arising from breach of contract by plaintiff, in that plaintiff having agreed, for value, that plaintiff should, in Winston-Salem, have the exclusive sale of an article of plaintiff's manufacture, described as the Marhof middy suits, for the seasons of 1916 and 1917, in breach of said contract, placed a quantity of these suits with regular retail dealers in Winston-Salem, amount and place stated, whereby defendant's sales were diminished and profit lost to the amount of $750.

Plaintiff demurred on the ground that said answer and counterclaim set up an agreement in violation of our Anti-Trust Act, as set forth in Gregory's Supp., sec. 3028, sec. 5, subsec. f; Laws 1913, ch. 41. The demurrer having been sustained in the county court, the ruling was affirmed in the Superior Court, and defendant excepted and appealed.

Craige & Vogler for plaintiff.
L. M. Swink for defendant.

HOKE, J., after stating the case: Originally at common law, agreements in restraint of trade were held void as being against public policy. The position, however, has been more and more modified by the decisions of the Courts until it has come to be the very generally accepted principle that agreements in partial restraint of trade will be upheld when they are "founded on valuable considerations, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest." Clark on Contracts (2d Ed.). The modification suggested has been approved and applied in numerous cases in this State where, on sale and disposition of a business, trade or profession, stipulations restrictive of competition on the part of the vendor have been held valid. Such deals between mere individuals do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for and to enable a vendor to dispose of his property at its full and fair value. *Bradshaw v. Milliken,* 173 N. C., 432; *Sea Food Co. v. Way,* 169 N. C., 679; *Kramer v. Old,* 119 N. C., 1; *Oregon Steam Nav. Co. v. Hinson,* 87 U. S., 64; *McCurry v. Gibson,* 108 Ala., 451; *Southworth v. Davidson,* 105 Minn., 119; *Herreshoff v. Bontineau,* 17 R. I., 3; *Diamond Match Co. v. Roeber,* 106 N. Y., 473; *Nordenfield v. Maxim App. Cases,* 1894, p. 535; Clark on Contracts, *supra;* 6 R. C. L., 793; 9 Cyc., 523-529.

In *Bradshaw v. Milliken, supra,* the doctrine as it now prevails with us is stated as follows: "Contracts in restraint of trade like the one we are now considering were formerly held to be invalid as against public policy, but the more modern doctrine sustains them when the restraint is only partial and reasonable. The test suggested by *Chief Justice Tindal* in *Horner v. Graves,* 7 Bing., 743, by which to determine whether the restraint is a reasonable one and valid is to consider whether it is only such as to afford fair protection to the interest of the party in whose favor it is given and not so large or extensive as to interfere with the interest of the public."

And in *Sea Food v. Way, supra,* the Court in its opinion quotes with approval from R. C. L., sec. 793, on the subject as follows: "Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill or talent by any contract that he enters into. On the other hand, public policy requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do this does not restrain him from alienating that which he wants to alienate, and, therefore, enables him to enter into any stipulation which, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

This doctrine of the common law as it now obtains, subjecting restrictive stipulations of this character to the test of right reason, has been applied to the interpretation of statutes on the subject where the terms are sufficiently indefinite to permit of construction, two notable instances being presented in the *Standard Oil* and *American Tobacco Co. cases,* 221 U. S., pp. 1 and 106. In the former of these cases, *Chief Justice White,* referring to the general terms of the Sherman Anti-trust Act, said, in part, "Thus, not specifying, but undoubtedly contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."

In the State statute relied upon by plaintiff in avoidance of the alleged contract, Laws 1913, ch. 41, the portion of the act directly bearing on the question, sec. 5, subsec. f, provides, in effect, that it shall be unlawful for "any one engaged in buying or selling anything of value

in North Carolina to make or have any agreement or understanding, express or implied, with any other person, firm or corporation or association, not to buy or sell such things of value within certain territorial limits within the State with the intent of preventing competition in selling or to fix the price or prevent competition in buying of said things of value within said limits," etc.

In thus making the invalidity of these agreements to depend upon the intent of the parties, and not arbitrarily on the effects of the agreement, the statute is sufficiently indefinite to permit of construction and discloses the purpose on the part of the Legislature to subject agreements coming under the provisions of this section to the standard of their reasonableness, to be determined by the character of the transaction and the purpose of the parties concerning it as disclosed in the contract and the facts and circumstances permissible and relevant to its proper interpretation.

This being the correct construction of the statute, it appears by the allegations of the answer, admitted to be true by the demurrer, for the purpose of presenting the question, that defendant, an established merchant in Winston-Salem, bought of plaintiff, a manufacturer of middy suits, desirous of introducing his goods into a new market, a large quantity of such middy suits, and in compliance with her agreement and as a part of the consideration, defendant had spent large sums of money and much time and effort in advertising the goods and popularizing them on the local market, and had lost heavily by plaintiff's breach of the agreement in placing designated quantities of the goods with other local dealers. On these facts, if accepted by the jury, we are of opinion that such a contract, made in good faith, does not come within the inhibition of the statute, and the demurrer should be overruled that defendant's counterclaim may be considered and passed upon.

We were cited by counsel to the case of *Fashion Co. v. Grant*, 165 N. C., 453, as an authority against our present decision, but in that case the contract came under another section of the statute and contained a stipulation that rendered it void by express and unequivocal terms of the portion of the law directly applicable.

There is error in overruling the demurrer, and this will be certified that the cause be proceeded with in accord with this opinion.

Reversed.

CURTIS BEAVER, BY HIS NEXT FRIEND, P. M. McGRAW, v. W. H. FETTER.

(Filed 6 November, 1918.)

1. Appeal and Error—Evidence, Irrelevant.

In an action by an employee to recover damages involving only the negligent failure of the employer to furnish sufficient help for the work he was required to do, an answer of a witness that the employer had generally furnished sufficient tools could have no effect upon the verdict, and was without prejudice to the defendant's rights.

2. Damages—Negligence—Personal Injury—Earning Capacity.

Where the plaintiff sues to recover damages for a personal injury alleged to have been negligently inflicted on him by the defendant, his employer, his earning capacity before and after the injury is competent on the issue of damages.

3. Evidence—Collective Facts—Opinion.

A carpenter who was present at the time the plaintiff was injured while assisting to get out certain lumber in the course of his employment may testify as a fact, from his experience, that the defendant had not furnished sufficient help for the purpose, when relevant to the injury, and his testimony is not incompetent as opinion evidence.

4. Appeal and Error—Evidence—Objections and Exceptions.

Where the witness has already, and without objection, testified to certain matters of evidence, an objection thereafter made to the same evidence will not be considered upon exception and appeal.

5. Evidence—Demurrer—Nonsuit.

Where there is sufficient evidence to take the case to the jury after the introduction of the plaintiff's evidence, the defendant's demurrer thereto and renewed after all the evidence had been introduced is properly denied.

APPEAL by defendant from *Shaw, J.*, at the January Term, 1918, of FORSYTH.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant.

On 14 June, 1916, the plaintiff was a helper in the employment of the defendant in the construction of a building on North Liberty Street, in the city of Winston-Salem, N. C. The defendant had in charge of the construction as foreman a Mr. Duke. The defendant had piled some timbers 12 x 12 x 24, weighing about 2,000 pounds each, two deep along Liberty Street on the top of other timber 10 x 10, making a pile about three and a third feet high. At the north end of the pile the defendant had constructed a tool-house, which extended about ten feet from the curb into the street and at the time of the injury complained of had some large window frames setting against the tool-house extending south past the end of the heavy timbers. The defendant had nailed cross pieces

from the top of the window frames to the heavy timbers to hold them up, thus forming a pocket 18 inches wide with a space of 12 to eighteen inches between the tool-house and the ends of the timbers. Mr. Duke, the defendant's foreman, had instructed the plaintiff, who was a minor and inexperienced, and two carpenters to get a girder from the bottom of the pile and directed the plaintiff in particular to go into the pocket and hold one end of the girder on the pile of timber to prevent its falling against the window frames while the other two let the other end of the girder down with canthooks. The plaintiff complained to Mr. Duke, who was present and directing the work, that there was insufficient help, that he could not hold the heavy girder himself, but Mr. Duke ordered him to "go on and do it." The plaintiff attempted to obey.

There was evidence tending to prove that the place where the plaintiff was required to work was not reasonably safe, and that there was insufficient help to move the timbers.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed, assigning the following errors:

1. That the court erred in allowing the plaintiff to testify, over defendant's objection, as to whether he had done similar work and how many men it took to do it.

2. That the court erred in allowing the plaintiff to testify, over defendant's objection, what his weekly average earning capacity was before he was injured and since then.

3. That the court erred in allowing the witness Frank Morgan to testify as to whether the workman had sufficient help back at the far end to keep the log from falling off, over defendant's objection.

4. That the court erred in declining to grant defendant's motion for judgment as of nonsuit at the close of plaintiff's evidence.

5. That the court erred in refusing to grant defendant's motion for judgment as of nonsuit at the close of all the evidence.

John C. Wallace for appellee.
S. J. Bennett for defendant.

ALLEN, J. 1. The first assignment of error is not sustained by the record. The witness was asked if he had done similar work before, and how many men were required, but his answer was that they generally had sufficient tools, which has no bearing on any alleged negligence of defendant, and could not have affected the verdict.

2. The earning capacity of the plaintiff before and after his injury was competent and material on the issue of damages.

3. Frank Morgan, a carpenter, was present at the time of the injury and was testifying to a fact which came under his observation, and not to an opinion, when he stated that the defendant did not have sufficient

help (*Taylor v. Security Co.*, 145 N. C., 83; *Ives v. L. Co.*, 147 N. C., 308; *Britt v. R. R.*, 148 N. C., 40); but if incompetent, the witness had already testified to the same fact, without objection, when he said, "To handle it right and no danger, you ought to have six or seven men. I did not see but three at the place and time of this accident."

In *Ives v. L. Co.* the same question was presented, the Court said, "The reply of the witness that the defendant did not furnish rafting gear 'sufficient' to do the business was competent as evidence of a fact within his knowledge. This was not a mere matter of opinion, but the result of knowledge and observation."

4 and 5. The motion for judgment of nonsuit could not have been allowed at the close of the plaintiff's evidence because, as is admitted in the brief of the defendant, "there was some evidence to go to the jury," and if so, the same evidence was in at the conclusion of all the evidence, although its force may have been weakened by the evidence of the defendant or of the plaintiff in rebuttal.

We have carefully examined the record and find no error.

No error.

IN RE STONE.

(Filed 6 November, 1918.)

1. **Courts—Justices of the Peace—Appeal—Superior Courts—Jurisdiction.**

   On an appeal from an order of the clerk of the Superior Court allowing compensation to attorneys employed by the next friend of an infant in his successful action against the guardian for wrongful conversion of the property to his own use, the Superior Court acquires jurisdiction, and may hear and determine the matter *de novo* as if originally begun there, though the jurisdiction may have been erroneously assumed by the clerk.

2. **Courts—Jurisdiction—Custody of Funds—Guardian and Ward—Attorneys and Client—Attorneys' Fees—Costs.**

   Where the judgment in an action by a ward against his guardian has been rendered in the Superior Court in favor of the ward, and the court has taxed the entire estate with the cost, including a fee to the attorneys employed by the next friend under authority of court, but reserving the amount for further determination, upon motion made by the attorneys at a subsequent term of the court, an order was promptly entered fixing the amount of such compensation, the court having retained not only the cause, but the control of the funds.

3. **Guardian and Ward— Attorney and Client— Attorneys' Fees— Amount— Courts—Contracts.**

   Where it is proper for the attorneys for a ward, employed by the next friend, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for the sole determination of

the court, irrespective of any contract that may have been made, to be fixed with regard to the value of the services in relation to that of the estate; and under the circumstances of this case, the Supreme Court, on appeal, reduced the amount, fixed by the Superior Court judge, from $1,000 to $500.

4. **Appeal and Error—Attorney and Client—Attorneys' Fees—Guardian and Ward—Costs.**

In this case the attorneys for the ward successfully prosecuted his action against his guardian, and the Superior Court judge properly allowed them a fee, but in double amount of that finally allowed on appeal by the guardian: *Held*, one-half the costs on appeal were taxable against the guardian individually and the other against the attorneys.

CLARK, C. J., dissents.

THIS is a proceeding before the Clerk of the Superior Court of Wake County begun by R. W. Winston, J. Crawford Biggs, and Moses N. Amis to have an allowance of attorneys' fees made to them for services rendered to Thomas S. Stone, a minor, in a civil action entitled *In re Stone*, 173 N. C., 280. From the order of the clerk allowing the sum of $650, Mrs. Carey W. Stone appealed to the Superior Court. The matter was heard by *Stacy, J.*, at June Term, 1918, of Wake Superior Court, who made an order allowing counsel one thousand dollars and directing that Mrs. Stone pay said sum into court for their use. From such order Mrs. Stone appealed.

Douglass & Douglass and Murray Allen for appellant.

W. L. Watson, M. N. Amis, R. W. Winston, and J. C. Biggs for appellees.

BROWN, J. It is contended that the Superior Court acquired no jurisdiction to make such order in the original case of *In re Stone* because the proceeding was erroneously commenced before the clerk, who had no jurisdiction. When the matter reached the Superior Court by appeal the judge had the right under the statute to assume jurisdiction and dispose of the case as if originally begun there. Clark's Code, sec. 255 (3d Ed.); *Roseman v. Roseman*, 127 N. C., 497, and cases cited.

The case of *In re Stone* was still pending in the Superior Court by virtue of the decree of *Bond, J.*, who tried it at October Term, 1916, as follows:

"It is further ordered, adjudged and decreed that the said Carey W. Stone, as administratrix and guardian, render an account to the Clerk of the Superior Court of Wake County on the sum of $6,500 received by her for the use of the said infant, Thomas S. Stone; that she give the bond in double the said amount as guardian of the said infant, as required by law, and that she be allowed until the first day of December to give said bond in the penal sum of $13,000.

"It is further ordered and adjudged that the said Carey W. Stone, guardian, pay the costs of this action out of the entire fund; and it appearing that notice of appeal to the Supreme Court has been given herein, the amount of attorneys' fees to be paid to the attorneys representing the next friend in the protection of the estate of said infant is reserved for the future determination of this court, to be taxed against the fund belonging to said infant."

By reason of that decree the Superior Court retained its control over the case, and when the appeal from the clerk came before *Judge Stacy* he had jurisdiction to hear the matter *de novo* and to treat it as a motion in the original cause.

The facts are that Mrs. Stone, as administratrix, recovered $10,000 for the negligent killing of her husband. A controversy arose between her and her only child as to the division of this fund. In that action E. P. Stone, uncle of Thomas S. Stone, the infant, was appointed next friend by the court to protect the interests of the infant. In order to do so, he employed counsel to appear in the cause, which they successfully prosecuted to this Court, and thence followed it to the Supreme Court of the United States. Under the final judgment, they recovered for the infant $6,500.

We are of opinion that the Superior Court retained jurisdiction of the cause and control of the fund, and that the judge had authority to make the order. It was peculiarly his duty to make the allowance under the circumstances of this case, as the next friend had been directed to employ counsel and the infant's mother and guardian were hostile to them.

The *prochein ami,* or next friend, is appointed by the court to protect the infant's rights. It is essential that he have the assistance of counsel learned in the law. The infant has no power to contract as to fees, and in most cases is too young to understand such matters. Referring to the duty of the court in respect to infants, in *Tate v. Mott*, 96 N. C., 23, *Judge Merrimon* says: "The infant is in an important sense under the protection of the court; it is careful of his rights, and will in a proper case interfere in his behalf and take, and direct to be taken, all proper steps in the course of the action for the protection of his rights and interests."

It would be very singular that the Courts should assume the duty of seeing that all steps are taken to protect the infant's rights and yet deny to themselves the power to compel the payment of the necessary expenses out of the infant's estate recovered in the cause.

While the next friend has power to employ counsel to prosecute the action, and it is his duty to do so, he cannot make a binding contract for compensation. *Houck v. Bridwell*, 28 Mo. App., 644. The court

may fix the attorneys' compensation without regard to any contract. 14 Ency. P. & P., 1037, and cases cited; *Cole v. Superior Court,* 63 Cal., 87.

In this case the Supreme Court of California says: "An attorney accepting employment and rendering services under such circumstances must rely upon the subsequent action of the court in ascertaining and adjudging proper compensation. . . . There is no place here for the doctrine of an implied promise upon a *quantum meruit.* . . . The attorney performing legal services for the infant aids the court in carrying out its duty of protection. He is not only an officer of the court in a general sense, but is the special agent through which the court acts."

The Court further says: "The statute being silent as to the tribunal which is to fix the compensation, it seems to reasonably follow that the court placing him in position and making use of his services would have the fixing of the compensation of the attorney employed."

The case of *Outland v. Outland,* 118 N. C., 141, is direct authority. In that case Thomas Outlaw, *non compos mentis,* brought action by his next friend to subject land to a lien for a legacy devised by his father. The next friend employed counsel. The plaintiff was successful in charging the land with the legacy. Counsel was allowed $200 by the Superior Court. In reviewing the matter, the Supreme Court said: "We think the allowance of $200 as an attorney's fee in this case is too much and it is reduced to $100." The Court passed on the allowance and reduced it and allowed the amount that seemed just. See, also, *Graham v. Carr,* 133 N. C., 458. We think our position is sustained also by the following additional cases: *Colgate v. Colgate,* 23 N. J. Eq., 373; *Richardson v. Tyson,* 110 Wis., 572; *Smith v. Smith,* 69 Ill., 313. We do not question the authority of such cases as *Mordecai v. Devereux* and *Patterson v. Miller.*

The question involved in this case was not presented in those cases. There was no next friend in either of those cases and no attorneys representing infants by direction of the court. In this case the Superior Court did not interfere between attorney and client. The attorney was not employed by the infant, but by direction of the court, and acted under its control. To our minds, it would be extremely unfortunate to the cause of infants generally to hold that the court has no power to reward the attorney out of the estate recovered.

Coming now to the matter of compensation, we concur with the Illinois Court in *Smith v. Smith, supra,* that "Courts have no right to be prodigal with the means of their wards; and whilst they should make just allowances, they are bound to see that their funds are protected."

Attorneys, being officers of the court, are sometimes compelled to

render laborious service for no fee, and to the credit of the legal profession be it said such service is rendered most willingly. When serving under the direction of the court to protect the rights of an infant, their compensation is to be measured by the standard of official emoluments rather than by that of the prices demanded and paid between individuals free to contract at will.

In this case, the services rendered by the able counsel who represented the infant were undoubtedly valuable and attended with expense, and have so far been unrewarded. The case was argued before this Court and the Supreme Court of the United States; but it is not altogether a question as to what their services are worth; so much as it is, what is the infant's estate able to pay? Measured by that standard, we feel it our duty to reduce the sum allowed to $500.

With that modification, the order of *Stacy, J.*, is affirmed.

The costs of this Court will be taxed against Mrs. Carey W. Stone individually, one-half and the other half against Winston, Biggs, and Amis.

Affirmed.

CLARK, C. J., dissenting: It appears from the record in this case that at no time has there been any fund in court. At no time has one cent of the $1,000 which the plaintiffs ask the court to order the guardian to pay them been in the control of any court or in the custody of any of its agents. This appears by the records of the proceeding. The very motion by which the plaintiffs ask that the court appropriate $1,000 of the ward's money for the payment of their fees specifies that it is in the custody of the guardian (his mother), and asks that she "be ordered to *pay the same into court.*" Such order would not be necessary if the fund were already in court.

The record shows that the defendant guardian, as administratrix of her deceased husband, received $10,500 on 10 November, 1915, by a compromise in an action against the Seaboard Air Line Railroad Company for the wrongful death of her husband. Not one cent of that money has ever been a "fund in court" or subject to the control of any court. On 24 May, 1915, she applied for and was appointed guardian of her son, her only child, who resides with her, and gave bond 1 December, 1916, as directed, in the sum of $13,000 for the custody of the $6,500 belonging to her son. That fund was invested in real estate and has been in her custody and control as guardian from that hour to this. Of the $10,500 collected as above, she paid out $750 counsel fees—*i. e.*, $250 for collecting her one-third and $500 for collecting her son's two-thirds, leaving in her hands $6,500 as guardian.

On 2 July, 1916, more than a year after her appointment as guardian, the clerk, by a citation *ex mero motu*, notified her, as administratrix,

to render an account of this and the other funds in her hands, and in passing upon such account directed her to hold the $6,500 as guardian for her son, being two-thirds of the net fund after payment of counsel fees. In her answer, under the advice of her counsel, she pleaded, as appears in the record, that she did not claim to hold the money of her son as her own, but that she held it as trustee for him under the Federal Liability Act, and not as guardian, and appealed from the order of the clerk, but the order was affirmed by the judge and by this Court and an attempted writ of error by her counsel to the United States Supreme Court was dismissed summarily for want of jurisdiction and without hearing any argument from these plaintiffs. For this the estate of the boy is now asked to be taxed by the court in the sum of $1,000 for counsel fees; and by as much right, there may be the same motion to tax his estate $1,000 for counsel fees for the guardian in resisting the motion. The next friend was not appointed till 16 September, 1916, after the matter had gotten into the Superior Court.

This proceeding to assess and recover lawyers' fees against the guardian, who has her ward's estates in hand by a mere motion, is entirely without precedent in this State, and there is no statute to authorize this. The motion seeks to recover out of the guardian legal fees for services rendered the ward when there is no fund in court, nor has been. It is in effect an action, though begun by a motion and not by a summons, alleging services rendered the ward when there has been no attempt to agree with the guardian as to the value of the services rendered, and without submitting it, as all questions as to the value of services rendered must be submitted, to a jury.

The clerk can audit her account, but could not, as here attempted, adjudge any indebtedness and order the guardian to pay it. Nor can the Superior Court do so except by judgment rendered in an action against her regularly begun by summons; nor has this Court jurisdiction, for no fund is in this Court; nor have we jurisdiction by appeal of a matter of which the court below had no jurisdiction. We are "No judges of such matters." Acts xviii, 15. The idea of the plaintiffs—or petitioners, whichever they may be, for the proceeding is anomalous—seems to be that the clerk, or their brother lawyers on the bench, would be better informed as to the value of their services and would, therefore, be more liberal in fixing the amount of their compensation than a jury. But if such practice is to be begun now, it will be created by "judicial legislation," for there is no statute and no precedent for the court to fix the value of a lawyer's services and ordering a guardian or administrator to "pay the money into court" any more than for a doctor's services or a grocer's bill. If such practice is now to be inaugurated, it is apprehended that it will become a most serious embarrassment to the judges

to be called upon to fix the fees of counsel in every case where the party for whom the services were rendered happens to be a minor who has a guardian, or is an administrator or executor, with whom counsel fail to agree as to the value of the services rendered. If the fees of counsel can be adjusted by this short-hand process of application to the court in this case it can be done in all such cases.

In this instance, the plaintiffs, or petitioners (whichever they should be styled) ask the approval of a fee of $1,000 and its payment by the guardian for representing the interest of the ward. She is the mother as well as the guardian of her son's estate and is seeking to protect that fund in her hands from what she deems an excessive charge. If allowed, there will be equal ground for the counsel of the guardian to apply for $1,000 to be allowed him for the same service, for the court cannot adjudge that there was not equal ability and service on each side. If the guardian shall be ordered to pay $1,000 fee out of the ward's fund to plaintiffs for seeking to have the $10,500 fund (received for his father's death) apportioned in a certain way, the counsel on the other side is equally entitled to $1,000 for aiding the guardian to resist the apportionment. Then there will come, with as much reason, an application to allow fees to counsel on either side for making and opposing this motion to allow the $1,000 fees to each side.

What has been said so far is in reply to the claim made that there has been a fund in court, when the record shows that at no time has there been any fund in the custody of the court. But taking it to be true that there was such fund in court, this motion is contrary to all the precedents in this Court, which are that the Court cannot fix the fees of counsel if there is objection. The duty of the Court is to conserve any fund in its hands, and not to divide it out among counsel whose views in regard to the value of their services may, as in this case, be in excess of what the guardian or trustee may think just. In such cases counsel must come to an agreement with the guardian, subject, of course, to the power of the clerk to cut down the amount, though agreed on, in passing upon the account of the guardian or administrator.

The guardian alleges: (1) That the court had no jurisdiction because the fund is not in the hands of the court. (2) That the counsel should adjust the amount of the fee by agreement with the guardian, subject to exception and review by the court in passing upon her accounts as guardian. (3) And that if the guardian does not allow counsel what they deem a sufficient sum, their remedy is by action on a *quantum meruit,* in which action the amount will be settled as in all other disputes between client and counsel when no sum has been agreed upon, by the verdict of a jury. (4) She further urges that the amount allowed,

both by the clerk, and still more by the judge, is excessive for services rendered in merely having the ward's share in the fund adjudged.

According to the precedents in our Courts, the judgment of the court was without jurisdiction. The fund is not in the hands of the court, and, therefore, on that ground, of itself, the proceeding should be dismissed. But even had there been a fund in court, the judge had no power to fix the fees of counsel when the guardian charged by his oath and bond with the custody and safe-keeping of the ward's estate objects to the amount.

In *Mordecai v. Devereux*, 74 N. C., 673, this Court said: "The question is decided. *Patterson v. Miller*, 72 N. C., 516. This Court has never interfered between attorney and client in making allowances for professional services, and we are not inclined at this late day to assume the power to do so. We make allowances to the clerk for stating an account, or to a commissioner for making a sale, on the ground that the work is done by order of the Court. We have never supposed that we could be called on to settle fees between client and attorney, although there be a fund in the keeping of the Court."

In that case a large fund was in court, and the trustees and commissioner, one of whom was this writer, applied to the court to fix the fees of counsel, there being a very large number of creditors whom it was impossible to consult, many of them being minors and married women, and some of them might be dissatisfied with the allowance to counsel.

In the present case, the guardian having an adversary interest, it was proper and indeed according to the practice of the Courts and necessary that the ward should be represented by a next friend, who had no authority to make a special contract as to the amount of the fee. But none the less, the services were rendered for the ward's estate and the guardian should allow a reasonable and just fee for such services. This would be a proper charge against the estate of the ward in her hands, and she has no pecuniary interest herself against the allowance of a proper fee. If she refuses reasonable compensation, counsel must proceed by action against the guardian as custodian of the ward's estate.

In *Gay v. Davis*, 107 N. C., 269, it was held that the Court "Has no authority to determine what compensation counsel shall demand or ought to have." To same effect, *R. R. v. Goodwin*, 110 N. C., 175.

In *Loven v. Parsons*, 127 N. C., 302, the Court says: "Certainly all just and proper disbursements for counsel fees by the collector can be proved against the estate and recovered against the administrator if he refuses to pay; but this must be done in the proper legal method and *forum*, the administrator having his day in court and an opportunity to contest the necessity or validity or the amount of such disbursements."

It is true that when a trustee finds it necessary to employ counsel in

the management of an estate under the control of the court, his reasonable disbursements for counsel are allowed out of the trust fund upon the settlement of his account, but this is to be done just in the same way that reasonable counsel fees paid by a guardian, administrator or executor are allowed in the settlement of the estate. *Whitford v. Foy,* 65 N. C., 276; *Young v. Kennedy,* 15 N. C., 267. In such cases, as was said by the Court in *Mordecai v. Devereux, supra,* the trustee must make the allowance, subject to have the amount surcharged in his settlement if, on objection, it is found to be excessive. But this does not authorize a court to make such allowance when it is opposed by the guardian or personal representative. The court cannot create a debt against the estate.

In *Lindsey v. Darden,* 124 N. C., 308, the Court says: "If an administrator employ counsel to assist him in his administration, the contract is personal and is not a debt against the intestate's estate. The administrator must pay it, and if the disbursement is proper it will be allowed him in the settlement of his account with his estate."

The court allows fees to referees, to surveyors, to experts, to commissioners as a part of the costs, both because such services are rendered by them as agents of the court and there are statutes expressly authorizing it; but counsel are the agents and representatives of the parties and must be paid if, as in this case, there is (and could be) no special contract upon a *quantum meruit* to be agreed upon with the guardian or ascertained as in all other cases by an action for services rendered. When services have been rendered an executor, administrator, guardian, or trustee, and he pays for the same, he is allowed for the disbursement upon the settlement of his account if not found to be excessive, but the court cannot intervene and by a short-hand process fix the fees for legal services and require a personal representative or guardian to pay counsel, upon motion, any more than it could fix the fees of a doctor or a mechanic, or for any other service to the estate, and direct payment.

In some jurisdictions, where the statute, unlike ours, allows the courts to fix the fees for counsel in certain specified cases without the intervention of a jury, the resulting scandal and charges of favoritism on the part of judges to counsel alleged to be favorites have not been edifying. In this State our statutes have left no opening for such charges. It would be a most unenviable duty if the judges were charged with fixing the amount of fees for their brethren of the bar in cases of difference between them and their clients, and if they can do so between a guardian and counsel they have the same power and duty between counsel and any other client.

In England, where the legal profession is divided into barristers who address the juries and courts and attorneys who prepare the briefs of

facts and of the law, draw and file the pleadings, and perform similar services, the fees of attorneys are prescribed for every act, as are those of our clerks and sheriffs, and taxed in the costs. On the other hand, the barrister's compensation is considered an *honorarium,* and is usually paid in advance, and when it is not he cannot recover by action for his services. The attorney's fees thus taxed as a part of the costs subjected the losing party to imprisonment for nonpayment; and if not then paid, the winning party was liable to imprisonment for nonpayment of his own costs. The result was the encouragement of much litigation "on spec" (as it was called), and sometimes the imprisonment of clients on both sides, as graphically depicted by Charles Dickens in his memorable description of the Fleet Prison and the imprisonment of both suitors in "Pickwick Papers."

In North Carolina, the fees of attorneys were taxed as part of the costs, ranging from $2 to $20 in each case—*i. e.,* $20 in a suit in equity, $10 in the Supreme Court, $10 in the Superior Court where the title of land came in question, and in all other cases in that court $4, and the county court $2. Revised Code (1854), ch. 202, sec. 16; Revised Statutes (1836), ch. 105, sec. 16; Modified Batt. Rev. (1875), ch. 105, sec. 29. And, of course, suitors could be imprisoned for nonpayment thereof till 1868, when imprisonment for debt was abolished. On the other hand, lawyers were subjected to payment of all costs when an action was dismissed for failure to file the complaint in time, and to double damages for all injuries caused by fraudulent practices. Rev. Code, ch. 9, secs. 5 and 6; Batt. Rev., ch. 7, secs. 5 and 6. Lawyers' fees had no other recognition in this State or priority over any other debt beyond this, and this was expressly repealed by ch. 41, Laws 1879, which provided: "Clerks of the Supreme and Superior courts shall not include or charge in any bill of costs any attorney's fees in any civil suit hereafter determined in any court of the State, and all laws or parts of laws coming in conflict and within the meaning and purview of this act be and they are hereby repealed." *Clifton v. Wynne,* 81 N. C., 160. Since then the fees of counsel are on the same basis as any other indebtedness, without lien and without official recognition beyond the fact that when rendered to a personal representative, guardian or trustee, the amount of such fee is subject to review by the clerk of the Superior Court, or the court having charge of the fund, in passing upon the accounts of the personal representative, guardian or trustee, especially if objection is made by the parties in interest. There is no lien or other preference given a lawyer's fee even when the fee is charged for collection of that very fund, in the absence of an agreement by the client for payment out of the fund. *Bank v. O'Brien,* 175 N. C., 338.

In the action to recover the $10,500 for the wrongful death, the ad-

ministrator paid counsel $750, of which $500 has already been deducted from the two-thirds of the fund ($7,000), which was the child's two-thirds, leaving it $6,500. It is now sought to take another $1,000 out of this child's $6,500, which is held by the guardian under an oath and with the security of a bond for its safe-keeping, without its being allowed by the guardian and without the constitutional guarantee, both by the State and Federal Constitutions, of trial by jury to fix the value of the services for which the debt is claimed. Besides, fees must then be allowed counsel on the other side; and the ward's estate must be taxed by the same right for counsel fees on this motion.

This little child, 11 years old, could make no contract for lawyer's services any more than it could with a doctor for saving its life and nursing it back to health, or for necessary clothing from a merchant, nor for a board bill, nor for groceries to live upon. In such cases, if it has property, a guardian is appointed for its safe-keeping and the bill should be presented to that guardian for all services for the benefit of the ward, and is paid, subject to the approval of the clerk in passing upon the guardian's accounts. If not allowed by the guardian, the amount must be settled in an action between the claimant and the guardian.

A lawyer is not in a privileged class that exempts him from the requirement that like the doctor, or merchant, or grocer, he must prove the value of his claim to the satisfaction of a jury. The fact that the judge is a lawyer gives the claimant for legal services no short-hand process to have the value of his services assessed in any other way than is required for the doctor, the grocer, or any other creditor. Doubtless, in practice, judges may have sometimes fixed such fees, but not when, as here, the guardian has demanded a jury trial.

The sole, solitary case in our Reports which is relied on as a precedent that the courts in this State have allowed counsel fees is *Outland v. Outland*, 118 N. C., 131, where the land of an idiot was sold and, he having no guardian, the money was paid into court. The court allowed $200 lawyers' fees, and though the idiot could not object, this Court cut it down to $100 and cited as authority for allowing even that amount *Moore v. Shields*, 69 N. C., 50, which held that a guardian could be allowed by the clerk, in approving his accounts, a reasonable fee ($50) paid by him to his counsel for defending an action brought by the ward against him for a final settlement of his accounts.

In this case there has been no fund in court, and the ward has a guardian who is seeking to protect his estate from what she deems an excessive charge for legal services. She is the child's mother as well as guardian, and is asking that the value of the legal services rendered shall be submitted to a jury, and not to a judge. It does not matter whether the child had any guardian at the time services were rendered, or that

they were rendered at the request of a former guardian, or, as in this case, of a next friend, for the indebtedness is against the estate and to be allowed or disallowed by the guardian, who has the ward's property in hand at the time the claim is presented for payment.

The courts, since it was first held in *Marbury v. Madison* in 1803 that they could do so, have set aside acts of Congress and of the legislatures as unconstitutional, though the members of those bodies have been men of ability and under the same duty to observe the Constitution as the courts. The courts have also held unconstitutional acts of the Executive Department. They have not only held that the other two departments of the government have often acted in violation of the Constitution, but they have held that the courts themselves have acted unconstitutionally, not only when a higher Court reverses a lower upon a constitutional question, but by overruling their own decisions. For instance, the United States Supreme Court for a long series of years held that a corporation was not a citizen entitled to the removal of a cause on the ground of citizenship, and then reversed that ruling and held that it was. The same high Court held that the Legal Tender Act was constitutional, and then that it was not. It held, for a hundred years, that the income tax was constitutional, and then that it was not, which last ruling was reversed by the people (after twenty years delay by the plutocracy) by prohibiting the Court from following the latter decision, which action alone of the people has made it possible for this country to carry on the present great war. Then the Court held in the *Lockner case* that it was unconstitutional to restrict the hours of labor working in 120 degrees temperature to ten hours, and they have reversed this by holding valid the Adamson Law, which limits to eight hours the labor of railroad employees; and there are many other cases. In our own State, in 1833, it was held by a very able Court, in *Hoke v. Henderson,* 15 N. C., 1, that an incumbent had a right of property in his office, and that though it had been created by the Legislature, that body could not change the term of an office from life tenure to a term of years, and from being appointive to be elective by the people. That opinion, though approved by the Court in more than sixty cases, was at last overruled and set aside as unconstitutional in *Mial v. Ellington,* 134 N. C., 131. In each of these, and in other cases, the Court in the later opinions necessarily held (when the first decision ruled an act was unconstitutional) that the prior decision was unconstitutional. Therefore, with the most respectful regard for the opinion of my brethren, but in compliance with my duty as I see it, I believe that the "judicial legislation" by which the Court now for the first time, and without statute and contrary to the precedents above cited, has conferred the power on the clerk, or the Superior Court judge,

and on this Court, to fix the value of the services of counsel is in violation of the Constitution—and this on two grounds:

1. The "*right* of trial by jury" is guaranteed without any exceptions wherever a recovery is sought which will transfer money or property of one person to another by order of a court, and the amount thus sought to be recovered depends upon issues of fact, as in this case, the value of the services rendered, which is denied by the defendant guardian. Cons., Art. I, sec. 19.

2. It is "class legislation," which is forbidden by Cons., Art. I, sec. 7, which provides that "No man or set of men are entitled to exclusive emoluments or privileges from the community but in consideration of public services."

This action of the Court gives to lawyers an exclusive and valuable privilege, for when the value of their services is to be fixed and they cannot get the guardian, administrator or trustee to agree to the estimate of counsel as to the value of their services, instead of being relegated to an impartial jury of twelve men, like the doctor, the grocer, or the merchant, and all others having claims against the estate, they are now held by this decision entitled to have their compensation fixed by one of their own profession upon the bench, who naturally may have a higher estimate of the value of legal services than a jury, and will be indisposed to antagonize members of the profession who have been their friends and comrades of the bar, and who may become such again upon retirement from the bench.

Though trial by jury was not provided for in Magna Carta (for at that time there were neither juries nor lawyers in England), juries and lawyers were evolved in the development of judicial proceedings long after Magna Carta and at about the same period of time. From that time to this, lawyers have been the foremost advocates and most uncompromising supporters of "trial by jury" in the ascertainment of all disputed matters of fact, and opposed to leaving them to the decisions of judges, who, in this State, have been forbidden since 1796 even to express an opinion upon the facts. Laws 1796, ch. 452; Revisal, 535.

Having spent my life in the ranks of the legal profession, I view with alarm this innovation which it seems to me likely to revive much of the hostility to the profession on account of the privilege thus given it by judicial, and not by statutory, enactment. In the first Constitution for this State (Locke's Fundamental Constitutions, sec. 70, to be found 2 Revised Statutes of 1839, p. 459) it was provided: "It shall be a base and vile thing to plead for money or reward," and further provided that no one except a near kinsman, not further off than cousin germane to the party concerned, shall be permitted to plead another man's cause, and unless he first should take an oath in each case that he has not

received, and will not receive, directly or indirectly, money or other reward for pleading the cause.

Laws 1801, ch. 12, sec. 3, continuing in force the act creating our first court of appeals, the "Court of Conference," which was the original of the present Supreme Court, provided: "No attorney shall be allowed to speak, or be admitted as counsel, in the aforesaid Court." And a later act, known as "Potter's Act," restricted to a small sum the amount which a lawyer could agree upon to be paid by any client. Happily, we have outlived those days of unreasoning prejudice against the profession, and such acts have long since been repealed, lawyers being left free to fix their compensation for their services by agreement, like any one else; and, like any one else, to have them valued by a jury in cases of disagreement. By chapter 41, Laws 1879, was repealed the sole remnant of the interference of the courts which had authorized tax fees for lawyers to be assessed in the bill of costs against the losing party.

If, by this action of the Court, the right is now created that the fees of lawyers can, on their application, be fixed by the courts and judgment shall be rendered for the payment thereof, with denial of the constitutional privilege to the party who must pay them of having a jury to assess the value of the services rendered, it is to be apprehended that the special privilege thus given to them as a class will revive the feeling so quickly aroused in all free countries against "special privileges" to any one class that is denied to all others. I do not believe that my brethren of the bar will desire this. Therefore, with profound respect for the opinion of my associates, as already stated, I must enter my earnest dissent to a decision which I deem is in violation of the Constitution.

Having deemed it proper and necessary to present earnestly, though unavailingly, my opposition to this innovation in view of the troubles that will come to the judges and the public criticism of them if, without statute and without precedent, they are vested by this decision with the invidious power of fixing fees of counsel whenever a guardian or administrator is unwilling to pay the amount charged, and counsel are unwilling to submit the value of their services to be fixed by a jury, I have not thought it necessary to discuss the amount of fees which the Court shall see fit to allow in this case. But as the matter of the fee is the sole origin and motive of this proceeding, and is the only point before us, if the Court holds it has jurisdiction, I am in accord with the Court that the $1,000 allowed below is excessive for the service rendered, but I am further of the opinion that the $500 allowed here is more than such fair and reasonable sum which the ward's estate should pay, and in my judgment is an excessive tax upon the child's estate, which has already paid a fee of $500. There is no disputed fact and only one single simple question of law, with no complication. See the opinion *In re Stone*, 173 N. C., 210, 212.

As to the adjudication of costs against the guardian personally for resisting this motion to order the guardian to pay $1,000 fees claimed by plaintiffs, it would seem that it was clearly her duty as guardian to oppose the allowance of a fee against her ward's estate in her hands of $1,000 or any other amount which she might deem excessive; and as this Court has adjudged that such sum is double what ought to have been allowed, the costs of the appeal should be paid by the plaintiffs. Rev., 1279; *McLean v. Breece,* 13 N. C., 393.

Even if the costs, or any part, were adjudged against the defendant, it should be adjudged against the ward's estate in her hands, for whose protection she took this appeal. She was not acting for herself, but for her ward (and her only child) in endeavoring to protect his estate from what she deemed an excessive charge. The Court has adjudged her contention correct. The $500 which she is ordered to "pay into court" will be paid solely out of the ward's estate, as the whole $1,000 would have been but for her provident action in appealing to this Court. Why should she be punished for the faithful discharge of her duty as guardian by being taxed personally with the costs? She is not a defendant individually, but as guardian. The costs should be taxed against the plaintiffs, who have had their "recovery" reduced one-half.

P. H. HANES v. CAROLINA CADILLAC COMPANY.

(Filed 6 November, 1918.)

1. Nuisance—Automobiles—Garage—Gasoline.

The general use of automobiles for business and pleasure make public garages and supply stations for gasoline, etc., an essential, and their establishment and maintenance are not nuisances *per se.*

2. Same—Injunction.

In this case the court properly dissolved an order restraining the defendant from maintaining a garage and supply station for furnishing gasoline, etc., to the public at a place near the plaintiff's residence, the fact that it was a nuisance not having been established by a verdict of the jury, and the conditions under which it may be maintained as set forth in the judgment are held sufficient to safeguard the plaintiff's rights.

WALKER, J., dissents.

INJUNCTION PROCEEDING, heard by *Lane, J.,* at September Term, 1918, of FORSYTH.

From the order made the plaintiff appealed.

Louis M. Swink and Hastings, Stephenson & Whicker for plaintiff.
A. E. Holton and D. H. Blair for defendant.

BROWN, J. The plaintiff seeks to enjoin defendant until the final hearing of this cause from establishing a public supply station for automobiles on a lot near plaintiff's residence property. The judge dissolved the temporary restraining order and refused an injunction to the hearing, but required defendant not to store over 1,500 gallons of gasoline in its 8,000-gallon tank at one time. Whereupon defendant complied with the order and installed two 1,000-gallon tanks, instead of the 8,000-gallon tank. Defendant purposes to obey the order by storing 1,500 gallons in the two 1,000-gallon tanks.

Automobiles are of such general use that they have become a part of the daily life of our people in business as well as for pleasure. Public garages and supply stations are essential and cannot well be dispensed with. The establishment of such public conveniences even in residential sections of cities and towns have been held not to be a nuisance *per se*. *Sheman v. Lexington,* 128 N. Y., 681. It has been further held that the storage of gasoline in suitable tanks set well down in the earth does not constitute a nuisance *per se*. *Harper v. Standard Oil Co.,* 78 Mo. App., 338; *Cleveland v. Gaslight Co.,* 20 N. J. Eq., 201.

It is a general rule that where the thing complained of is not a nuisance *per se*, but may or may not become so, according to circumstances, and the injury apprehended is eventual or contingent, equity will not interfere. *Berger v. Smith,* 160 N. C., 208; *Chambers v. Cramer,* 54 L. R. A., 542.

The defendant's supply station has not been declared to be a nuisance by the verdict of a jury upon final hearing, and in the meantime we are of opinion that the rights of plaintiff have been duly safeguarded by the order made.

Affirmed.

L. VYNE v. FOGLE BROS. CO.

(Filed 6 November, 1918.)

1. Evidence— Adverse Parties— Examination— Clerks of Court — Courts— Jurisdiction.

Proceedings to examine an adverse party before the clerk or upon commission must be instituted after summons has been issued and action commenced, and on motion before the clerk of the Superior Court of the same county or the judge presiding over that court, or holding the courts of the district; and a clerk of another county, where the action is not pending, is without jurisdiction over the proceedings, and his order made therein will be quashed. Revisal, sec. 866.

2. Same—Appeal and Error—Fragmentary Appeals.

An appeal to the Supreme Court will directly lie from the refusal of the Superior Court judge to vacate an order of the clerk of that court to ex-

amine an adversary party to an action pending in another county; and there being no cause therein in which an exception may be noted and preserved, an objection that the appeal is fragmentary cannot be sustained.

MOTION to set aside and vacate an order for examination of defendants, under provision of section 866 of Revisal, made by the clerk of the Superior Court of Forsyth County, heard upon appeal by *Shaw, J.*, at February Term, 1918, of said county.

The judge affirmed the order of the clerk. Defendants appealed.

Hastings, Stephenson & Whicker and Hackett & Gilreath for plaintiff.

Louis M. Swink for defendants.

BROWN, J. It is admitted that no such cause as is entitled above is pending in Superior Court of Forsyth County, although there is such a cause pending in the Superior Court of Wilkes. No examination can be had in any case until the summons had been issued and the suit commenced in the Superior Court of the county. The motion for an examination must be made before the clerk of the Superior Court where the suit is pending or before the pudge presiding in that court or holding the courts of the district. The party may be examined before a commissioner appointed to take the examination, but the commission must issue out of the court in which the cause is pending. This is the plain purport of sections 865 and 866 of the Revisal. It is not contemplated by the statute that the clerk of Forsyth Superior Court shall have jurisdiction to make an order in a cause pending in Wilkes. If that were the law, then every other clerk of the Superior Court in the State could make an order for the examination of a party without regard to where the action was pending. Such construction of the statute would produce infinite confusion and lead to greater hardships and would make the statute "the means of the greatest abuse and oppression," as said by *Justice Walker* in *Smith v. Wooding,* 94 S. E., 405.

This statute is discussed by *Chief Justice Smith* in *Strudwick v. Brodnax*, 83 N. C., 403, and it is there recognized that the examination must be taken before a judge or clerk of the court wherein the cause is pending. It was afterwards provided by the Legislature that commissioners could be appointed. This case was reconsidered in *Commissioners v. Lemly,* 85 N. C., 342, and somewhat modified, but the principle was left intact, that the proceeding to examine a party must be taken in the cause pending between the parties.

position that the appeal is premature cannot be maintained. Nthe reasons given in *Vann v. Lawrence,* 111 N. C., 32, or *Holt* v. Use Co. apply here. No action was pending in Forsyth

County, and therefore no exception could be taken and preserved while the trial proceeds. An exception cannot be taken in Forsyth when the trial takes place in Wilkes. It is a question of jurisdiction as to whether this proceeding can be commenced in Forsyth, and we are of opinion that the clerk was without jurisdiction, and that the proceeding must be quashed.

Error.

S. S. MANN v. T. C. MANN ET ALS.

(Filed 6 November, 1918.)

1. **Judgment—Estoppel—Drainage Districts—Amendments.**

Where the final judgment in proceedings to form a drainage district, under a statute, has omitted to include a reservation in the petition that the assessments on the lands should not exceed a certain amount per acre, and an injunction against a greater assessment has been refused by final judgment, in a later action, this judgment operates as an estoppel between the same parties to have the judgment in the first proceedings amended so as to incorporate therein the limitation sought to be imposed.

2. **Judgments—Amendments—Subsequent Term.**

A final judgment rendered in due course in proceedings to establish a drainage district may not be amended at a subsequent term of the court to supply an alleged omission to limit the assessments to be made on the land in accordance with that stated in the petition, there being nothing to show that the judgment was not recorded by the clerk as actually given to him, or that it had been omitted by inadvertence of the judge or the mistake of any one.

3. **Appeal and Error—Judgments—Collateral Attack.**

The correction of a final judgment for error rendered by a court having jurisdiction over the parties and subject-matter is by appeal, and it may not be collaterally attacked except for fraud, collusion, etc., or when it is void and its invalidity appears upon its face.

4. **Judgments—Estoppel—Parties—Subject-matter—Form of Action.**

Where a final judgment has been rendered between the same parties on the same subject-matter, it is not essential that a later action or proceeding be identical in form for it to estop the parties therein, as *res judicata*.

5. **Judgments—Correction—Equity.**

One who has been defeated on the merits in an action at law cannot afterwards resort to a bill in equity upon the same facts for the same redress.

6. **Judgments—Third Persons—Equity—Innocent Persons—In Pari Delicto.**

Upon this motion, made in the cause to amend a final judgment in proceedings to form a drainage district so as to restrict the amount of as-

sessments made upon the lands after the issuance of bonds thereon, the principles are applied that the one of two innocent persons must suffer whose conduct has occasioned the loss.

7. Judgments—Amendments—Inadvertence—Laches—Drainage Districts.

Where by motion at a subsequent term of the court a final judgment entered in proceedings to establish a drainage district, under the provisions of a statute, is sought to be amended so as to include a provision limiting the amount of assessments to be made on the lands, the mere failure of the parties at the time to request that the provision be inserted in the judgment does not alone entitle them to the relief sought.

8. Drainage Districts—Judgments—Assessments—Statutes.

A provision in the petition limiting the amount of assessments to be made on lands within a drainage district being formed under the provisions of the statute, which was not inserted in the final judgment rendered in due course, may not at a subsequent term be supplied by amendment, being also contrary to the statutory provisions and invalid.

9. Judgments—Amendments—Laches—Equity—Drainage Districts.

The parties having failed for nine years after final judgment, in proceedings to establish a drainage district, to proceed for a correction of this judgment therein have lost their equitable right by their laches, if any they had, to have the judgment amended so as to supply an omission caused by inadvertence or mistake, etc.

10. Judgments—Amendments—Statutes—Laches.

A motion for relief from a judgment coming within the provisions of Revisal, sec. 513, because of mistake, inadvertence, surprise or excusable neglect, should be made within the time fixed by the statute; and if a motion to amend a final judgment in proceedings under the statute to form a drainage district comes within the intent and meaning of this section of the Revisal, the parties will lose their rights by failing to act in the time required.

11. Appeal and Error— Superior Court— Judgments— Refusal to Allow— Amendment—Several Grounds—Reasons Assigned.

Where the trial judge has given one of several valid reasons for refusing to amend a former judgment upon petition in the cause, the Supreme Court, on appeal, is not confined to the sole ground of his refusal, and may sustain him upon the others properly appearing in the record.

CLARK, C. J., concurs; ALLEN, J., dissents; BROWN, J., concurs in the dissenting opinion.

SPECIAL PROCEEDINGS, tried before *Bond, J.*, on 10 July, 1918, upon a motion to amend the judgment of the court therein.

The object of the original proceeding was to establish a drainage district composed of the lands covered by the waters of Mattamuskeet Lake and those lands within two miles of its shores, under the Laws of 1909, chapters 442 and 509. The clerk of the Superior Court appointed a board of viewers, and thereafter such proceedings were had as were authorized by the statutes. Exceptions were filed by many of the parties,

which were heard and considered by the court, and finally the district was established by judgment of the court to be known as Mattamuskeet Lake Drainage District. It is now alleged that there was omitted from the final judgment this important provision: "Your petitioners join in the foregoing petition in this proceeding upon the express condition that after the proper drainage of the said proposed district is affected, as set out in this petition, or as may be adopted by the proper authorities as provided for herein and the by-laws authorizing same, then the cost of maintaining and keeping the proper drainage in effect shall not exceed 15 cents per acre for each acre included within the bounds of said district," by the mistake or inadvertence of the court and parties, and the petitioners ask that the judgment be amended by inserting the said clause so as to restrict the power of assessment by the board of drainage commissioners for the costs and expenses of maintaining the district within the prescribed limits as intended by the parties to be done.

The clerk of the court before whom the motion to amend the judgment was made entered the following judgment therein:

"After hearing the evidence and argument of counsel, I find the following facts, to wit:

"(1) That it was the intention of the parties to this proceeding that the final judgment should contain words, in substance, the same as those set out in the original petition, as follows: 'After the proper drainage of the said proposed district is affected, as set out in this petition, or as may be adopted by the proper authorities, as provided for hereunder and by the laws authorizing same, then the cost of maintaining and keeping proper drainage in effect should not exceed 15 cents per acre for each acre of land included within the bounds of said district; as to all other lands except those embraced in the lake bottom, and as to them shall not exceed 45 cents per acre,' and that the said language, or the same in effect, was omitted from the judgment by mistake and inadvertence.

"(2) That the parties to this proceeding had no notice that said language, or language to the same effect, was not set out in said judgment until twelve months before the filing of this motion:

"And upon said findings of fact it is ordered and adjudged that the said final judgment in this proceeding be and is hereby altered and amended so as to contain the aforesaid omitted words.

"The movants will recover their costs.

"This 2d day of May, 1918. S. D. MANN,

"Clerk Superior Court, Hyde County."

The respondents, Board of Drainage Commissioners of Mattamuskeet Lake District, New Holland Farms, Inc., and the North Carolina Farms Company, excepted to the judgment and appealed to the Superior Court,

where the presiding judge refused to amend the judgment upon the ground that it would seriously affect the rights of innocent parties who had bought bonds to a large amount issued on behalf of the district, and also others who had purchased lands included in the district, all of whom had acted upon the correctness of the judgment as it now is, and who, therefore, would be greatly prejudiced by any such change in the former judgment. He directed judgment to be entered accordingly, and the motioners appealed to this Court.

Other facts will be found in the two cases above mentioned, as reported in 156 N. C., 183, and 175 N. C., 5, to which reference is again made.

Ward & Grimes and H. C. Carter, Jr., for plaintiffs.

Spencer & Spencer and Small. McLean, Bragaw & Rodman for defendants.

WALKER, J., after stating the case: This case was before us at a former term, under a different name (*Gibbs v. Drainage Commissioners of Mattamuskeet Lake District*. 175 N. C., 5), upon an application for an injunction to restrain the collection of a tax by the Board of Drainage Commissioners in excess of the amount, as fixed in the clause of the petition above set forth. The case also was here at a still earlier term, when one of the parties sought to restrain by injunction the issuing of $100,000 of bonds to pay interest on a previous issue of bonds to the amount of $400,000, and which required $60,000 and the cost of maintenance of the work until its final completion, which required $40,000 of bonds. (*Carter v. Drainage Commissioners*, 156 N. C., 183.)

This Court dissolved the injunction which had been granted in the first case by *Judge Carr* and affirmed the order of *Judge O. H. Allen* refusing a restraining order in the second case above cited. Our opinion is that those two cases have effectually disposed of this case upon its legal merits, and there is much less reason for allowing the proposed amendment of the judgment than there was to grant the injunction sought in the former litigation over the rights and liabilities of the parties under the final judgment.

If one of the questions now presented was not decided in the *Carter case*, it was directly raised and precisely decided in the *Gibbs case*, which was an application to enjoin the Board of Drainage Commissioners and the sheriff from collecting the assessment made by the former in excess of the 15 cents per acre for keeping up and maintaining the drainage system in good condition, so that it would be suitable for the purposes intended to be accomplished. It is certain that the plaintiffs in that suit could not attack the final judgment of the court collaterally, for so long as it was unreversed or left intact it imported verity. It could be set aside for fraud or upon other equitable ground, or if the

court had pronounced one judgment and another had been substituted or recorded by mistake or inadvertence of the clerk or court, the record might be made to speak the truth, as we will see hereafter, but as long as it remained in its integrity, what it declared could not be questioned in a collateral proceeding, but was and is conclusive, provided the court rendering the judgment had the requisite jurisdiction to do so. If it was erroneous, the remedy to correct the error was by appeal; if irregular—that is contrary to the course and practice of the court—by motion (or direct proceeding) to set it aside; if it was obtained by fraud, collusion, and so forth, by a civil action to have it annulled; and it can be attacked collaterally if it is void and its invalidity appears on its face. No attempt has been made to set it aside upon either of the grounds mentioned, but the plaintiff, or petitioners, seek to have it amended upon substantially the same facts and reasons as were set up in the former proceeding for an injunction (*Gibbs v. Drainage Commissioners, supra*).

The respondent contends that the petitioners are estopped by our decision in that case to proceed further in this one, or, in other words, that the doctrine of former judgment, or *res judicata,* deprives them of the right to again raise the same question which was then decided. This requires us to examine this doctrine in view of the facts and the history of the two cases.

The principle stated generally is that the causes of action must be the same, and the former adjudication must have been on the merits, but it is not necessary that the form of the actions or proceedings must be identical. 2 Black on Judgments (2 Ed.), secs. 726 and 729. We may gather from that learned and accurate author and other sources the following as substantially the statement and application of the rule as to the bar by a former judgment: It is a well-settled rule, and one which is supported by a multitude of authorities, that a party cannot by varying the form of action or adopting a different method of presenting his case escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies. Historically, this important rule is as old as the time of the Roman jurists (Dig. 44, 2, 5. See Pothier on Obl., pt. 4, c. 3, p. 3, art. 4, p. 4) and rests upon broad foundations of justice and expediency. That it has prevailed from very early times in the English law will appear from *Slade's case* (4 Coke, 94b. See, also, Y. B. 12 Edw. IV, 13a), wherein "it was resolved that the plaintiff in this action on the case on assumpsit should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in the action would be a good bar in an action of debt brought upon the same contract; so, *vice versa,* a recovery or bar in an action

of debt is a good bar in an action on the case on assumpsit." And to quote from a much later decision: "That the remedy sought, or the mere form of action, may be different does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as compensation or redress for the alleged wrong, or if upon those facts he was entitled to no remedy, adjudication of his right to recover in that action bars his right to afterwards seek a different remedy upon the same facts or cause of action." *Hardin v. Palmerlee*, 28 Minn., 450; *Miller v. Manice*, 6 Hill (N. Y.), 114, 122.

Under this principle we may cite the familiar rule that one who has been defeated on the merits in an action at law cannot afterwards resort to a bill in equity upon the same facts for the same redress. And so, also, where a claim has been once interposed by way of setoff, whether it was allowed or rejected, if it was considered on the merits, the judgment will bar any independent suit on the same claim. *Eastmure v. Laws*, 5 Bing. N. C., 444. But the cases most frequently calling for the application of this rule are those in which a party attempts to found two separate actions upon a transaction which justifies but one suit. For example, in *Hacasher v. Coddington*, 32 Minn., 92, it appeared that the plaintiff had formerly brought trover against the defendant to recover damages for the alleged wrongful conversion of certain personalty, and now, upon the same state of facts, he sued to recover possession of the specific property itself. In each case he predicated his right to recover upon his general ownership and right of possession of the property, the wrongful possession of the defendant, and his refusal to return it upon the rightful claim of the plaintiff. The only difference was in the relief prayed for. It was held that the subject-matter and cause of action in both cases were the same, although the form of action and relief sought were different, and therefore the judgment in the first action was a bar to a recovery in the second. 2 Black on Judgments, secs. 729 and 730.

There are other apparent exceptions to the rule, but we need not extend this part of the discussion for the purpose of including them, as they have no direct relevancy to our facts. When we examine, even cursorily, the judgment in *Gibbs v. Drainage Commissioners*, 175 N. C., 5, we find that it was based upon several grounds, each one of which was sufficient of itself to defeat the petitioner's recovery. We held, first, that the agreement was violative of the statute (Public Laws of 1909, chs. 442 and 509), in that it was required by section 29 (and also by other sections of the act) that such assessments should be laid upon the lands within the district "as may be necessary to maintain the same after its formation," and because of this conflict between the agreement

restricting the limit of assessment to 15 cents per acre of the land, this Court ruled that no relief against the judgment, legal or equitable, could be granted. It was said in strong and emphatic language by the *Chief Justice* that if the agreement should be enforced it would result that the petitioners would be liable for not exceeding 15 cents per acre, in which event the State's interest, or that of the Board of Education, in the lake bottom would be assessed 45 cents per acre, as the latter paid three-fourths, and, therefore, it followed that the whole assessment of 60 cents "would be totally inadequate for maintenance," and this would cause the destruction of the work, which is of much importance to the public, and upon which $600.000 have already been spent. The Court said, in closing its opinion: "The plaintiffs waived the limit of 15 cents per acre for maintenance by acquiescence in the final report, and also in the final decree establishing the district, without incorporating such restrictions, and by assenting to the issuance of $500,000 in drainage bonds, whose holders, though not parties to this action, will have their rights seriously impaired if there is not a sufficient fund raised for maintenance from time to time. This fund may be less or greater at different times, depending upon the season and the conditions as to labor and material, which will vary. The only restriction as to the apportionment of the maintenance is that the amount assessed shall be necessary, and that three-fourths shall be paid, and not more, by the owners of the lake bottom, the assignees of the State's interests, and the other one-fourth by the rest of the district. The plaintiffs have shown no equity which entitled them to the restraining order, which, besides, seeks to disregard the ratio created by the decree establishing the district and the statutes, chs. 442 and 509, Laws 1909."

The Court further said that if it had been alleged, *and shown*, that the amount of the new assessment was in excess of what was reasonably necessary for the maintenance of the system of drainage, as contemplated by the general statute (Act of 1909, ch. 442), or if it was laid arbitrarily, or from improper motive, to oppress any of the owners of land lying inside of the lake bottom, the petitioners would have presented quite a different case, and would have been entitled to equitable relief by injunction against the levy. But that was not the case, the simple effect being to contravene the statute by enforcing an agreement not authorized by any of its provisions. So we see it was substantially held that the agreement was void as being against the policy and purpose of the law. This will the more clearly appear from the opinion, a part of which is as follows: "If there was any allegation sustained by proof, that the assessment is in excess of what is necessary for maintenance, or in abuse of the powers conferred by chapter 409, Laws 1909, or that the levy was made arbitrarily or from an improper motive to

oppress any of the owners of the land lying outside of the lake district, an issue of fact would be raised for determination and, upon sufficient proof, the court would be justified in granting a restraining order to restrain the levy of such assessment; but even in such case, the courts are always slow to enjoin, pending such inquiry, the prosecution of works affecting the public welfare, as this Court has often held. The object of the injunction here sought is not to restrain the assessment of the tax for maintenance to prevent oppression to the plaintiffs (for 50 cents per acre per annum cannot be oppressive to maintain the drainage of lands, much of which will produce 80 to 100 bushels of corn per acre), but relying upon a recital in the petition or prospectus of the proceedings to restrict the taxation of the petitioners, who are some of those owning lands outside of the district, thus throw vastly more than the burden—three times as much, as is now laid for the maintenance—upon the owners of the lake bottom, under the contract they agreed to, in taking the conveyance of the State's interest. It is not alleged nor shown that the increased assessments are not in the proportion of one-fourth on those holding lands outside of the lake bottom and three-fourths on the owners of the lake bottom, nor is it shown (though alleged) that the assessment is in excess of what is absolutely necessary for the maintenance of this great work."

It was further held that the judgment declared that the drainage district was "established under, and in accordance with, the provisions of chapters 442 and 509 of Public Laws of 1909," and that the parties could not make any agreement which was contrary to an essential or material provision of that statute, and especially one which not only contravened its terms, but would defeat or nullify the manifest purpose or object which the Legislature had in view. 9 Cyc., 480, 481; 6 Ruling Case Law, secs. 106, 107. The statute was passed not only to improve the lands which are affected by it, in usefulness and value, by reclaiming them from their submerged condition and rendering tillable their naturally fertile soil, thereby increasing the wealth and prosperity by the enhanced production of crops of that large and expanding community, but as well did it contemplate the protection of the health of its inhabitants, constituting it, therefore, an important public enterprise.

In view of these considerations, the court in that case felt constrained to hold that the agreement limiting the amount of assessments was of no effect and did not entitle the petitioners to any kind of relief against the judgment, by injunction or otherwise. The provision as to assessments was held to be mandatory in order to fully accomplish what the Legislature designed should be done under the statute. We have the right to consider the intention of the Legislature in deciding such a ques-

tion, and, besides, it is our duty to do so. 13 Corpus Juris., p. 420, sec. 351, and pp. 421, 422; sec. 352 and p. 421.

"It is not necessary that there should be an express prohibition in a statute to render void a contract made in violation of it. It makes no difference whether the prohibition or command is expressed or implied. Even where the statute does not in express terms declare the act unlawful, yet if it appears from a consideration of the terms of the legislation in question that the legislative intent was to declare the act unlawful, no contract involving the doing of such an act can be enforced. In other words, the inquiry is as to the legislative intent, and that may be found not only in the express terms of the statute, but also may be implied from the several provisions thereof. So a contract will not be enforced where it conflicts with the general policy and spirit of the statute which governs it, although there may be no literal conflict." 6 Ruling Case Law (title Contracts), p. 701, sec. 107.

A material fact should be stated here, which we find in the *Gibbs case, supra*, viz.: "In the original petition (section 5) it was recited that the cost 'of maintaining and keeping the drainage in effect shall not exceed 15 cents per acre for each acre included within the bounds of said district.' It has been found necessary, in order to properly maintain the drainage system, to levy a larger sum, and the plaintiffs, owners of some of the lands outside the edge of the former lake, seek to restrain the collection of a larger amount." It therefore follows that this question, though not precisely the same in form, was fully determined in the former action, the parties being the same even if the title of the action was not so.

"The principle of the rule as to *res judicata,* except in the case of mere subsidiary motions and some other instances, has no reference to the form or the object of the litigation in which the particular fact is determined which is thenceforth to be deemed established as between the parties to the dispute. The form or object of the prior litigation does not alter the conclusive effect of the judgment or decision. For instance, where the rights of a party are fully determined upon exceptions to a sheriff's return on sale of real property under execution, the decision is as conclusive as any other judgment. The essential thing is that there should have been a judicial determination of rights in controversy, with a final decision thereon." 2 Black on Judgments, sec. 509. But this case also is controlled by *Carter v. Commissioners,* 156 N. C., 183, where it was attempted (in 1911) to enjoin the action of the drainage commissioners of this district from issuing bonds to the amount of $100,000 for the purpose of paying interest on the bonds for $400,000 already issued and for maintenance of the drainage district, and the court held that the bond issue was valid; that the proceeding to estab-

lish the district had been prosecuted to a final decree; that the drainage system was of a public nature, and that they (the petitioners) should not be allowed to stay a work of great public improvement affecting many hundreds of other people upon the allegations of the complaint (attacking the validity of the bonds), and if there should be any misconduct on the part of the commissioners they can be held responsible in an action against them, but the work itself will not be stayed nor the issuance of the bonds for construction, interest, and maintenance, which is necessary for that end. It, therefore, appears that practically the same question was decided there; nothing, though, was said in that case by the petitioners about the limitation of 15 cents in making assessments in the alleged agreement of two years before, but the Court virtually held that there was no limit to the power of assessment, except the amount necessary to keep up the drainage scheme, beyond which the assessments could not go.

The bond issue of $100,000 was justified upon the distinct ground that it was necessary, under the statute, for the proper maintenance of the works without regard to any agreement of the parties, which was not specifically noticed, because not relied on, though the petition had been filed two years prior to 1911, when the *Carter case* was decided. The Court also held there that the ratio of three-fourths and one-fourth was established for the protection of the State's interest, as it had assumed liability, by way of guaranty, for the first bond issue in that proportion.

The Court in the *Gibbs' case* refused a decree for the petitioners for the additional reason that a large amount of bonds ($400,000) had been issued and purchased by innocent persons in open market, who had the right to act upon the belief that the judgment was correct, and that its integrity would be kept inviolate. "An amendment of a judgment will never be allowed to prejudice the rights of third persons, such as subsequent judgment creditors, purchasers, or mortgagees, who have acquired interests for value and without notice." 1 Black on Judgments (2d Ed.), sec. 169.

While a court has the admitted power to permit amendments in its record, process and pleading, within certain restrictions, both reason and authority deny the power where the amendment will evade the operation of a statute (for no court has the right, in this way, to nullify a statute), or where it will injure the rights of third persons who have acted innocently upon full faith in the correctness of the record or roll as it is, and have acquired rights for value and without notice of any error therein. *Phillips v. Higdon*, 44 N. C., 380; *Cogdell v. Exum*, 69 N. C., 464; *Patterson v. Wadsworth*, 94 N. C., 539; *Jefferson v. Bryant*, 161 N. C., 404; Anno. Cases, 1915, A, 58, and cases cited therein from other jurisdictions.

As to the power of the Court to amend a record or judgment, where the interests of a third party will be prejudicially affected thereby, see Freeman on Judgments (3d Ed.), sec. 74. There is also a rule that where one of two innocent parties must suffer, he who has so conducted himself, by his negligence or otherwise, as to occasion the loss must sustain it. Broom's Legal Maxims (6 Am. Ed.), marg. p. 686, op. of *Ashurst, J.;* 6 Term Reports (Eng.), 70. It is seldom the case that the scale of justice is exactly in equilibria, for it usually happens that some degree of laches, negligence, or want of caution, causes it to preponderate in favor of the one side or the other, although both parties may, in a certain sense, be considered as innocent or guiltless, there being no moral wrong; but even when both of the parties are equally innocent and equally diligent, the rule generally applicable is *Melior est conditio possidentis,* or *defendentis,* as the case may be, or, in other words, the person against whom the relief is asked must be favored; and this is assuredly true where he who asks for the relief has been in fault. And it also is correct to say that where a party seeks to enforce an agreement, which, even though not *malum in see* is *malum prohibitum,* or contrary to a statute, he will find himself not to be a favorite of the law, and certainly not of equity, for when he comes into a court to assert and enforce his supposed right two answers must be given to his demand: the one that he must draw justice, as it has been said, from a pure fountain, and the other that the condition of his adversary is the better one. *Munt v. Stokes,* 4 T. R., 564; 2 Inst., 391; Broom L. M., marg. p. 690.

"It is equally unfit that a man should be allowed to take advantage of what the law says he ought not to do, whether the thing is prohibited because it is against good morals, or because it is against the interest of the State." 6 R. C. L., p. 701, sec. 106, and *Cansler v. Penland,* 125 N. C., 578, where it is said:

"As to the validity of contracts, the law makes no distinction between acts *mala in se* and acts *mala prohibita,* or wrong, simply because they are prohibited by statute. When a statute intends to prohibit an act it must be held that its violation is illegal, without regard to the reason of the inhibition or the morality or immorality of the act; and that is so without regard to the ignorance of the parties as to the prohibiting statute. The law would be false to itself if it allowed a contract to be enforced in the courts against the intent and express provisions of the law."

And again: "The defense is allowed, not for the sake of the defendant, but of the law itself. It will not enforce what it has forbidden and denounced. . . . Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the

case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violations," citing *Oscanyan v. Arms Co.*, 103 U. S., 268.

The doctrine is that when the Court discovers that it is asked to aid in enforcing an illegal transaction, it will of its own motion withdraw its hand. *Cansler v. Penland, supra,* at p. 581. It is pleaded here, and the Court will not recognize it by inserting it in its judgment if otherwise it had the power to do so. So that whether we place our decision upon the ground of former judgment, or that the claim now made is inherently bad, as being against the provision of the statute under which the proceeding was instituted and the district formed, the petitioners must fail. It is a strict estoppel by former judgment created by the *Gibbs case,* and the *Carter case* is at least one of controlling authority against the petitioners.

But there is still another reason, which we will state presently, why the petitioners must fail, and one, if anything, more potential and efficacious than the others we have assigned. It is evidently the one upon which the court principally acted when it denied the prayer for relief. The judgment sought to be amended was not one by consent, and if it was this Court has held that it cannot be amended without the consent of all the parties to be affected thereby. 1 Black on Judgments, p. 230; *McEachern v. Kerchner,* 90 N. C., 177. It may be set aside for fraud, mistake, duress, and so forth, in a proper case, but there is no such prayer here and no allegation or evidence that entitles the parties to any such relief.

This is a judgment given upon full consideration by the court in *invitum.* The record shows that the testimony was carefully considered and the facts found by the court thereupon. Numerous exceptions were filed by sundry persons, and were, upon due notice to all parties, regularly and deliberately passed upon and the result declared upon the findings. It, therefore, was in all respects a judgment, upon due investigation, of the court, and not of the parties. It is undoubtedly true that a court may correct or amend its record, process or pleading, to make them speak the truth— that is, to record what was *actually* done by the court—but this rule does not extend in its application so far as to permit the court to revise a judgment and to insert in it something that it really and in fact did not do. It is not what the parties or the court intended to do, but did not do, but what was really done and was intended to be made a part of the record, but was inadvertently omitted

therefrom. The law is well settled on this point. The doctrine is thus stated in Freeman on Judgments (3d Ed.), secs. 69 and 70.

"During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during the term, as the judges shall direct; but when the term is past, then the record is in the roll and admitteth no alteration, averment, or proof to the contrary. . . . As a general rule, no final judgment can be amended after the term at which it was rendered. The law does not authorize the correction of judicial errors under the pretense of correcting clerical errors. To entitle a party to an order amending a judgment or decree, he must establish that the entry as made does not conform to what the court intended it should be when it was ordered. Thus if a solicitor inadvertently omit from a decree some clause which he intended to insert, and present the decree to the judge, who adopts it as the judgment of the court, this is no ground for an amendment, for the facts do not show that the court intended to pronounce any different decree from the one prepared by the solicitor, and to change the record would be equivalent to exercising a revisory power over the judgment itself by the same authority that pronounced it." 1 Black on Judgments, sec. 156, p. 227; *Forquer v. Forquer,* 19 Ill., 68.

Where the record itself furnishes the evidence as to what the judgment was the court may have it reformed so as to express formally what it did; or where it appears that certain entries should be made, in order to carry the judgment into effect, the court may perhaps pass an order to correct the apparent mistake. Freeman, sec. 70. But these are exceptions to the general rule and do not apply here. Nor are we concerned with the power of the court to correct its records during the term, when the whole matter is said to be "in the breast of the judge, or in *fieri,*" for then the record is "in paper"; but after adjournment "it is upon the roll," and the right of amendment is quite different, and is thus stated in 1 Black on Judgments, secs. 154 to 159, omitting immaterial parts:

"That part of the common-law rule which declares that no judgment can be amended after the term at which it was rendered can scarcely be said to survive in this country in all its original inflexibility. Divided between the policy of administering justice liberally and equitably and the habit of ascribing the utmost sanctity to a record once completed, the courts have suffered exceptions to be introduced which are of such importance as to require the rule to be much modified before it will apply to contemporary practice. A conservative statement of the rule as at present observed, and one fully supported by the authorities, would be as follows: After the expiration of the term at which a judgment

or decree was rendered, it is out of the power of the court to amend it in any matter of substance or in any matter affecting the merits. . . . We shall endeavor to show that, beside the correction of clerical errors, the courts have power, after the term, to supply omissions in a judgment and to reform and perfect it, so as to make it conform exactly to the judgment intended to be given in the case; but that they cannot use the power of amendment to correct judicial errors or to enter a judgment which was neither in fact rendered nor intended to be rendered. Taken with these corollaries, the rule as above stated will be found to express the common opinion of the authorities on this point at the present time. In illustration of the rule, the proposition may be cited that after the term the power of the court to amend its own record is limited to such corrections or changes as are in affirmance of the judgment originally rendered; it has no authority to strike out the judgment, to enlarge or diminish it, to change its whole nature, or to render another and different judgment upon the same record. As regards mere clerical errors, mistakes arising from inadvertence, or formal misprisions of clerks or other officers, it is always in the power of the court, even after the adjournment of the term, to make such corrections or amendments as truth requires. In regard to the power of amending judgments by supplying omissions, it is necessary not to lose sight of the principle that amendments can only be allowed for the purpose of making the record conform to the truth, not for the purpose of revising and changing the judgment. If the proposed addition is a mere afterthought and formed no part of the judgment as originally intended and pronounced it cannot be brought in by way of amendment; but, on the other hand, as already stated, the power of amendment cannot be made the means of adding to a judgment or decree something not originally contemplated by it or which is foreign to its intended scope and purpose. Thus, in an Illinois case, it appeared that a decree had been drawn up by the plaintiff's solicitor and accepted and signed by the judge as the decree of the court; afterwards it was discovered that the solicitor had omitted from the decree a clause which he had intended to make a part of it, and application was made to have it added, but it was considered to be no proper case for an amendment, inasmuch as it did not appear that the court had intended to insert the clause in question, and, consequently, to add it by amendment would be to change the sentence pronounced and revise its own decree. A judgment entry may be amended at any time to make it correspond with the judgment *actually* rendered; and for this purpose, either additions or elisions may be made. In a case where the judgment pronounced by the court upon motion of the defendant was 'that the complaint be dismissed with costs,' and the judgment entered by the clerk was that the complaint

be dismissed 'upon the merits,' with costs to the defendant, it was held that the insertion of the words quoted was a material addition to the judgment which the clerk had no authority to make, and was properly stricken out on motion. The allowance of an amendment should never be used by the court as a means of reviewing its judgments on the merits, or correcting its own judicial mistakes, or substituting a judgment which it neither in fact rendered nor intended to render. 'The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced *by the court* and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record or by striking out a statement of a fact improperly introduced, and when the record affords sufficient evidence. But when the defect consists in the failure of the court to render the proper judgment, *or arises from a want of judicial action,* the record cannot be corrected after the term has closed, the cause being no longer *sub judice.* A judgment, therefore, cannot be amended so as to vary the rights of the parties as fixed by the original decision of the court and the judgment entered thereon."

It was said in *Estate of Potter,* 141 Calif., 424, 426: "The fact that a party litigant inadvertently fails to ask for a judgment confers neither power upon the court to order, nor right upon the litigant to seek, a modification of such judgment as the court may have advisedly given. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such errors by ordering an amendment *nunc pro tunc* of a proper judgment."

The doctrine was strongly and clearly stated in *Heath v. N. Y., etc., Banking Co.,* 146 N. Y., 260, by *Judge Bartlett:* "The amendment made corrected no clerical error, no mistake of computation, but changed the substantial rights of the parties. It would be a most dangerous precedent if such a wide departure from due and orderly procedure, as is here disclosed, should be permitted. The contention of plaintiff's counsel that section 723 of the Code of Civil Procedure allows such a motion to be made is a mistake. This section was designed to confer upon courts the amplest power to correct mistakes in process, pleading, and in all other respects, so long as the substantial rights of parties are not affected. *Bohlen v. Met. El. Ry. Co.,* 121 N. Y., 546-550. In the case at bar a decision upon the merits was altered and defendant's recovery reduced by a very considerable amount. The plaintiff was not remediless in the situation in which he found himself, assuming there was merit in his contention, but he mistook his remedy when he resorted to motion now under review. The defendant cannot be subjected to a reduction in the amount of its original recovery and a radical change

in the rulings of the court on the questions presented, except upon a new trial. We express no opinion as to the merits, placing our decision solely on the ground that the special term had no power to entertain this motion."

And in *Ex Parte Sibbald v. U. S.,* 12 Peters (37 U. S.), 488, 492, *Justice Baldwin* said: "No principle is better settled or of more universal application than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistake, or to reinstate a cause dismissed by mistake, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review in cases of equity and writs of error *coram vobis,* at law are exceptions which cannot affect the present motion. Whatever was before the court and is disposed of is considered as finally settled."

The language of the Court in *Williams v. Hayes,* 68 Wis., 248, 255, fits closely the facts of our case. It was there said: "It would be unsafe to permit judgments to be changed in a substantial matter years after the same are entered upon the mere recollection of the judge that he intended to direct a different one from that which he expressly directed at the time, and we do not find any case which sanctions such proceedings. Such a modification of the judgment is not correcting the judgment as announced at the time, but it is making the judgment conform to what the court ought to have adjudged, or to what he intended to adjudge, but failed to adjudge. Such a change in a judgment can only be made during the term in which it was entered." *Latimer v. Morrain,* 43 Wis., 107; *Selz v. First Nat. Bank,* 60 Wis., 246; *Schobacher v. Germantown F. M. Ins. Co.,* 59 Wis., 86.

"Nothing could be added to or subtracted from the judgment at a subsequent term unless it was to correct a mere clerical omission or misprision." *Gibson v. Wilson,* 18 Ala., at p. 65.

We will content ourselves with one more quotation from the opinion of the Court (by *Clopton, J.*) in *Browder v. Faulkner,* 82 Ala., 257, 258: "The power of courts to amend judgments after the close of the term extends to all omissions to enter the judgments pronounced by the court and to clerical errors in the form of the entry, whether by introducing a fact which ought to appear on the record or by striking out a statement of a fact improperly introduced, and when the record affords sufficient evidence. But when the defect consists in the failure of the court to render the proper judgment, or arises from a want of judicial action, the record cannot be corrected after the term has closed, the cause being no longer *sub judice.* The purpose of amendment is to make the judgment conform to what the court intended it should be, to

set right the record, and to make it speak the truth, so that omissions or clerical errors shall not prejudice parties litigant. The power to amend *nunc pro tunc* is not revisory in its nature and is not intended to correct judicial errors. Such amendments 'ought never to be the means of modifying or enlarging the judgment or the judgment record so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matter which ought clearly to have been pronounced.' However erroneous, the express judgment of the court cannot be corrected as at a subsequent term." See 1 Black on Judgments, secs. 154 to 159.

The following cases will be found to state the same rule very explicitly and to confine it strictly within its limits in actual practice: *DeCastro v. Richardson,* 25 Calif., 49; *Evans v. Fisher,* 26 Mo. App., 541; *Mo., etc., Ry. Co. v. Haynes,* 82 Tex., 448; *Robinson v. Broom,* 82 Ill., 279; *Pursley v. Wickle,* 4 Ind. App., 382; *Gore v. Lyford,* 44 N. H., 525; *Chase v. Whitten,* 62 Minn., 498; *Day v. Mountin,* 89 Ibid., 297; *Johnson v. Foreman,* 24 Ind. App., 93. All of which cases hold that the power of amendment cannot be exercised where there has been "a mere judicial mistake," or a failure to do that which the court perhaps would have done if called to its attention, and if lawful to be done, or where it is a "mistake in the judgment and not in the record" which should be carefully distinguished; or where the relief asked for, under the guise of a proposed amendment, is really not an amendment, but an alteration of the original judgment, or where the proposed amendment is a means of incorporating into a judgment a mere afterthought or of modifying or enlarging the judgment, so that it shall express something which the court did not do, even though, as we have said, it embraces matter which, if legal, might have entered into the judgment of the court.

The rule as to the power of a court to amend its records has nowhere been better or more clearly stated, and the power confined within its proper orbit, than by this Court in former decisions. It was said by *Justice Reads* in *Wolfe v. Davis,* 74 N. C., at p. 599: "In granting the motion of the plaintiff to amend the record of Fall Term, 1869, by entering a judgment *quando, nunc pro tunc,* his Honor seems to have been of the opinion that the power to amend embraces something more than simply making the record speak the truth—not only what *was* done, but what *ought to have been done.* But that is error. And as there was not in fact any judgment *quando* rendered at Fall Term, 1869, it would be improper to make the record say that there was."

Simmons v. Dowd, 77 N. C., at p. 158, is more like ours in principle and the nature of the amendment proposed to be made, and there the same Justice said: "It is common learning that all the judgments and proceedings of the court are 'in the breast of the court' during the term

and may be vacated or amended in any way, but after the term closes they are sealed forever. This applies to all proceedings of the court which are regular and according to the course and practice of the court, however erroneous the same may be. And note that an erroneous judgment may be just as regular as one which is free from error. If I sue a man and recover $100, my judgment is regular. If I ought to have recovered $200, or ought only to have recovered $50, my judgment for $100 is erroneous, but still it is regular; and after the term of the court when it is rendered I cannot have it increased and the defendant cannot have it diminished. If this were not so, there would be no end to litigation."

The Court says, in *Wall v. Covington,* 83 N. C., 144, that the insertion in the judgment must be of something actually done by the court, the entry of which was omitted by its oversight, or that of the clerk.

It was held in *Moore v. Hinnant,* 90 N. C., at p. 163, 164: "It is simply an application to the court to alter the judgment entered and intended, upon mature consideration, to be entered, so as to permit and direct the case to be tried again in an aspect of it not heretofore, as is alleged, fully presented and considered. The application is an unusual one. Indeed it is without precedent, so far as we know, in this State. We have not been favored with an argument in support of it, and we have not, after diligent search, been able to find any decision or other authority that warrants it."

Speaking of the power to amend its records so that they will speak the truth and state what was really done by the court, and which was left out by mistake of it or its officer, the Court further says, in *Moore v. Hinnant, supra,* at p. 165: "The court has power at all times to make its records speak the truth, having due regard for the rights of parties and third persons. This power, however, ought to be exercised with scrutinizing care and caution. But the court has not the power at a subsequent term to revoke, set aside, alter or amend a final judgment entered at a former term, except upon application to rehear, or because of 'mistake, inadvertence, surprise or excusable neglect,' as allowed by law. The exercise of such a power is forbidden by principle and the overwhelming weight of authority, if indeed there can be any well-considered case found that sustains it."

That case quotes with approval the passage from *Coke* which is set forth in this opinion, and reviews the law at length. And in *Cook v. Moore,* 100 N. C., 294, at 295, this language is used by *Justice Merrimon:* "It is not contended that this Court can reverse, set aside, or modify in any material respect a regular final judgment at a term thereof subsequent to that at which it was entered. It is clear and well settled that it has no such authority except upon an application to

rehear, or because of 'mistake, inadvertence, surprise, or excusable neglect,' as may be allowed by statute. *Murphy v. Merritt,* 63 N. C., 502; *Mabry v. Erwin,* 78 N. C., 45; *Moore v. Hinnant,* 90 N. C., 163, and cases there cited; *Sebbald v. U. S.,* 12 Pet., 488; *Bank v. Moss,* 6 How., 31; *Bronson v. Schulten,* 104 U. S., 410." And thus conceding the power of amendment in proper cases and at the proper time, the Court proceeds to say: "The court has authority, upon application, or *ex mero motu,* at all times in term, and it is its duty, to amend and correct its records so as to make them speak the truth and be consistent and to make proper entries, *nunc pro tunc,* that were certainly intended, but omitted to be made by mistake, accident or inadvertence of the court. Such authority is essential. Courts are not infallible; they, like all other earthly tribunals, are liable to make mistakes of fact that cannot be corrected in the ordinary course of procedure, and it would contravene every principle of reason and justice if they could not in some way correct them. The law contemplates that each court can itself the better, the more certainly and accurately, correct such, its own mistakes, than another court, whether appellant or not. But such power should be exercised with great care and caution, and only upon clear and satisfactory proof, because when entries are made in the course of the business of the court they are presumed to have been made upon careful consideration and to be correct, and, moreover, they import absolute verity while they are allowed to remain," citing numerous authorities.

In 15 Ruling Cas. Law, at p. 673, sec. 124, we find the following statement of the law, the text being sustained by a full citation of authorities in the notes: "In the exercise of the power to make amendments a court is not authorized to do more than to make the records correspond to the actual facts, and cannot, under the form of an amendment of its records, correct a judicial error or make of record an order or judgment that was never in fact given. The power to amend should not be confounded with the power to create. It presupposes an existing record which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein. . . . An amendment of a judgment can be allowed only for the purpose of making the record speak the truth, and not for the purpose of revising or changing the judgment, or for the purpose of correcting an error of law therein contained. Nor can a judgment be amended so as to include provisions or directions not proper to have been made at the date of its original entry upon the allegations of the pleadings."

These authorities, therefore, hold that it is not what the court would have done if properly invoked to do it that will be put into the judg-

ment or other record, nor what the parties may have wanted the court to do and failed to ask for it, but rather what was in fact done and which was omitted by inadvertence of the court or clerk. The power of amendment, therefore, applies to the mere record of the judgment, and not to the judgment itself, which must be the same as the court delivered. *Scammon v. Bonslett*, 118 Calif., 293 (62 Am. St. Rep., 226).

The principle, as we have stated it, has been accepted with the greatest unanimity by the Courts of the country, and is both reasonable and just. Applying it to the facts in this record, we find nothing to take this case out of that principle, but everything to induce a strict application of it. The petitioners say that they did not see to it, that the clause in question was inserted in the judgment because of hurry and confusion at the close of the investigation, when the court was about to provide for an election of commissioners. Of course, this is an admission that no motion was made to the court to have the clause form a part of the judgment, and the application, therefore, resolves itself most assuredly into an effort to have done now what the petitioners did not do then, and also what the court did not do: to *revise* the judgment and not merely to *amend* it by making it speak the truth as to what was actually done by the court, and not to convert a miscopied judgment into the very one which the court in fact rendered, but which by inadvertence or mistake was not truly recorded. This will not do, and is contrary to all the authorities upon the subject. It would greatly impair public confidence in the integrity of our court records should we permit such an amendment to be made, and this is said without regard to its prejudicial effect upon innocent parties, who have paid out their money in the purchase of the bonds, relying on the perfect correctness and validity of the judgment. In the absence of fraud or other legal cause, and none such is alleged, it would be unjust to those parties and unwarranted in law or equity should we grant the prayer of the petitioners.

There is an allegation, *on information and belief*, that the clause was omitted from the judgment by mistake and inadvertence of the parties—and the court—but that is all, and it is insufficient to justify an amendment of the judgment. Where is there any *legal* evidence that the court at the time intended to and did pronounce any such judgment? The clerk does not so find, and if he had done so, there is no evidence to support such a finding. He simply states that "it was the intention of the *parties* to this proceeding that the final judgment should contain words in substance the same as those set out in the original petition," and, further on, "that the said language (setting it out in full), or the same in effect, was omitted from the judgment by mistake and inadvertence." Whose mistake and inadvertence? Why, of course, that of the

parties. This is no ground for interference by this Court with the judgment as it stands. The petitioners did not except to the findings of the clerk, and are therefore bound by them, and the respondent only excepted generally, thereby raising the single question whether, in law, the findings are sufficient to warrant the amendment of the judgment.

The judge could, and perhaps should, have acted upon this view of the record, and denied the motion, but as he dismissed the motion anyhow, we are not concerned with the reason upon which it should have been based. It was right, if any reason in law sustained it. He gave one of the several correct reasons upon which the denial could be founded, and this is enough.

We need not discuss the question whether the motioners were guilty of laches or have delayed action too long, but we may state generally that the delay was not excusable, nor was the failure to know what really was the form of the judgment. About nine years have elapsed since its rendition; there were many exceptions filed to it by the parties, and one suit brought to enjoin its execution. It would seem that during all this contention about it, exceptions filed to eliminate some of its terms and an injunction to stop its enforcement, some of the interested parties should have read it so as to find out what terms it did or did not contain. The failure to make proper inquiry cannot well be held as excusable when there was nothing done by the defendants or any one else to prevent investigation.

As we have held that the judgment cannot be amended for other reasons, it may not be needful to say much about *McCracken v. R. R. Co.,* 168 N. C., 62, on which the motioners rely, but there is a clear distinction between the two cases. In *McCracken's case,* the statute merely permitted an election upon the issuance of bonds for completion of the railroad. The people could vote for it or not as they pleased, and if so, they could do so upon condition, as they did, which was binding on the railroad company, as it induced a favorable vote for it. There was absolutely nothing forbidding such a condition, while here there is a provision—and a mandatory one, too—as shown by the *Chief Justice* in the *Gibbs case,* that a sufficient sum be raised by assessment to construct and maintain the drainage system. If that amount is reduced by agreement of the parties below what is necessary for the execution of the plan contemplated by the statute, the purpose of the latter is, to that extent, defeated, and the project must fail. This would be in direct violation of the statute, instead of being something impliedly permitted by it, as in the *McCracken case.* The petitioners will not, therefore, be heard to say that their assent to the judgment was based upon a stipulation which was against the express provisions of the statute. The restriction as to amount, or ratio, of assessment was

something that the court could not originally have inserted in the judgment, and it follows that this cannot be done by amendment. A judgment cannot be altered so as to include a provision not proper to have been inserted at the date of its original entry. *Scammon v. Bonslett,* 62 Am. St. Rep., 226.

The limitation as to cost of maintenance cannot be said to have been even tacitly observed, for there has been no occasion to exercise the power given by the judgment until recently, when increase in cost was found to be necessary. No application having been made to the court to insert the clause as to maintenance in the judgment, there could have been no mistake by the court or the clerk as to it, and the referee did not find that there had been any such mistake, and could not so find, as there was no evidence of it, and the court had no opportunity or chance to make a mistake. This being so, there was no choice between remedies left to the petitioners, as there was no remedy at all, because there was no right, either legal or equitable, to be asserted by motion, petition or action. It is not a case where the doctrine of correction or reformation applies, for there has been no mistake. The judgment records exactly what the court did, and the record needs no correction, for now it speaks the truth. All this is true even if the court could have inserted the illegal change upon proper application. If the clause had been legally inserted the bonds would have been unsalable, as the entire $400,000 bond issue would have been discredited in the market by a provision which would be utterly destructive of the security for them. We therefore hold that no amendment of the judgment can be made:

1. Because the petitioners are estopped by a former judgment deciding against them upon the identical question, the parties being the same.

2. This is not a consent judgment, but one given by the court upon consideration and *in invitum*, and is not, therefore, subject to amendment unless the court or its clerk has failed truly to record the judgment actually delivered.

3. There is no sufficient finding that the provision was intended by the court to be a part of the judgment and was omitted therefrom by its mistake or that of the clerk, and if there had been there is not, in law, sufficient evidence to support such a finding, if there is any at all.

4. The omission of the parties to request that the alleged provision be inserted in the judgment, even if inadvertent, does not entitle them to the relief asked by them.

5. The provision itself is opposed to the express terms of the statute, and therefore not enforcible, and could not legally have become a part of the judgment.

6. The petitioners have been guilty of such laches as would defeat their right to relief, had any existed, if they are not barred by the statute, Revisal, sec. 395 (9), could this proceeding be treated as an application for equitable relief.

7. If this is to be regarded as a motion to be relieved of a judgment, or other proceeding, under Revisal, sec. 513, because of mistake, inadvertence, surprise or excusable neglect, or to supply an omission in any proceeding under that section, the motion comes too late, as the time within which such relief can be granted—that is, one year—has long since expired.

The judge decided correctly, and we affirm the judgment.

Affirmed.

CLARK, C. J., concurring: The points raised by this appeal were decided in the former case, *Gibbs v. Drainage Comrs.*, 175 N. C., 5, and that decision is conclusive of this case, which merely presents the same contentions in a different way.

Milton's fallen angel does say, in the emphatic language quoted in the dissenting opinion in this case, that the judgment against him was final and conclusive, no matter "which way" he turned, but he completed the line by admitting the justice of the judgment. *Paradise Lost,* Book IV, line 75. Neither he nor any one else since has denied the conclusiveness nor the justice of the judgment. It has never been modified or reversed.

ALLEN, J., dissenting: The following stipulation appears in the petition, which is the foundation of this proceeding: "It is understood and the petitioners herein join in this proceeding upon the express condition that after the proper drainage of the said proposed district is effected as set out in this petition, or as may be adopted by the proper authorities as provided for hereunder and by the laws authorizing same, then the cost of maintaining and keeping the proper drainage in effect shall not exceed 15 cents per acre for each acre included within the bounds of said district."

This limitation on the cost of maintenance was observed until recently when the drainage commissioners, acting without making any application to the court, and without notice to the landowners, increased the assessment for maintenance from 15 cents, as provided in the petition, to 45 cents. The landowners then brought an action to restrain the collection of the increased assessment, contending that it was illegal, but relief was denied them upon the ground that the stipulation in the petition as to the cost of maintenance was not incorporated in the judgment. See *Gibbs v. Drainage Comrs.*, 175 N. C., 6. The landowners, following the procedure directed in *Banks v. Lane,* 171 N. C., 505, then

moved before the clerk to correct the judgment in the proceeding by inserting therein the provision in the petition as to maintenance, alleging that it had been omitted therefrom by mistake. The clerk found as a fact that the provision had been omitted by mistake, and that the landowners did not know of the omission until twelve months before this motion was made and ordered that the judgment be corrected. The drainage commissioners appealed to the judge, who refused to find any facts and dismissed the motion, and an appeal was then taken to this Court.

In this condition of the record the moving parties are entitled to have the appeal considered upon the assumption that their allegations are true, and that the provision as to maintenance was omitted from the judgment by mistake, and that they were ignorant of the omission until twelve months ago. If so, can the court afford relief? The power to do so is not denied, and, if controverted, instances of its exercise are numerous. "The court cannot at a subsequent term amend, modify or interfere with a regular judgment regularly entered of record at a preceding term; it can correct, amend, or modify such a one improperly entered, or enter one which, through accident, mistake of fact, or inadvertence of the court, was not properly entered, or not entered at the former term, when the court intended to enter and ought to have entered it." *Cook v. Moore,* 100 N. C., 296; *Beam v. Bridgers,* 111 N. C., 269, and cases cited.

It is, however, objected that the landowners have waited too long, and that bonds have been sold and are in the hands of innocent purchasers. The first objection is met by the fact that until recently there has been no effort to collect more than 15 cents, and that the owners were ignorant of the mistake, and, by the law as stated by *Smith, C. J.*, in *Brooks v. Stephens,* 100 N. C., 299, that "The court may, for the purpose of ascertaining the facts, hear evidence (*S. v. Swepson,* 83 N. C., 584); may supply an omission (*Perry v. Adams,* 83 N. C., 266; *Walton v. Pearson,* 85 N. C., 34); and may do this without regard to lapse of time (*Long v. Long,* 85 N. C., 415)." The second objection is not before us, as the bondholders are not parties.

As said in *Ashe v. Streator,* 53 N. C., 257: "It is a mistake to suppose that interests have vested under the records as it stands that prevent an amendment. The persons whose interests are affected are parties to the record. They are bound to know the truth of the transactions as to which the record speaks, to act upon the truth as it happened, and upon the expectation that the record will be made to speak truly. No party has a right to complain, and no other person has an interest that will be prejudiced." And in *Walton v. Pearson,* 85 N. C., 48: "It is the duty of every court to supply the omissions of its officers in record-

ing its proceedings, and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to its effect upon the rights of parties or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its records as made."

The proper procedure is, I submit, as in *Harrison v. Harrison,* 106 N. C., 282, and *S. c.*, 109 N. C., 346, to correct the judgment and to permit the papers to remain on file for the protection of the bondholders. It is not the time now to adjudicate the rights of the purchasers of the bonds, who are not before the court, and without giving the owners of the land to contest their right to claim as innocent purchasers without notice of the mistake. If relief is not granted to the landowners on this motion they are without remedy against an illegal assessment. If they apply to a court of equity they are told to move in the original proceeding, and when they make their motion they are denied a hearing upon the ground that they are bound by the judgments, and that a court will not correct them, although the result of a mistake. One is reminded of the despairing cry of Satan, as depicted by Milton, "which way I fly is hell."

L. B. WOODALL v. WESTERN WAKE HIGHWAY COMMISSION.

(Filed 6 November, 1918.)

1. Road Districts—Roads and Highways—Constitutional Law—Elections—Special Registrations—Majority Vote—Statutes.

The construction and improvement of public roads are a necessary expense, within the meaning of our Constitution; and for that purpose the Legislature, by the passage of an act meeting the constitutional requirements, as to its passing on the three several days and the recording of the "aye" and "no" vote (Art. II, sec. 14), may pass a valid act to become effective without submitting the question to the vote of the territory prescribed; and an act passed accordingly, requiring only a majority vote under a special registration for a road district as sufficient for the validity of bonds to be issued for the improvement of a public road within the district, is constitutional; and an objection that it should have required a majority of the qualified votes therein is untenable. Constitution, Art. VII, sec. 7.

2. Road Districts—Cities and Towns—Constitutional Law—Statutes.

The Legislature has constitutional authority to change, divide, and subdivide, or abolish the lines of counties, townships, and cities, or to bring them, in whole or in part, within districts it may establish for road purposes; and where an incorporated town lies within a created road district

and will receive the benefits of a road to be improved therein, it may not be objected that the road only came to its corporate limits and that therefore the act was unconstitutional in its provisions.

3. Road Districts—Single Highway—Constitutional Law.

The Legislature may create a district for the improvement and maintenance of a single road, within its constitutional authority to create road districts, by statute passed in accordance with the constitutional requirements.

4. Road Districts — Statutes — Constitutional Law—Delegated Authority—Registrars—Poll Holders.

Where the Legislature has passed a valid statute creating a road district, it may confer authority on the commissioners of an incorporated town therein to appoint the registrars and poll holders of an election to be held therein by the voters within the district.

5. Road Districts — Statutes — Bonds — Sales—Road Commissioners—Delegated Powers—Constitutional Law.

Legislative authority given to the commissioners of a special road district created by the act to sell bonds, for the purposes of the roads to be improved and maintained, within their discretion, at a price not less than par, is constitutional and valid.

6. Constitutional Amendments—Time of Its Effect—Road Districts—Taxation.

The recent constitutional amendments ratified at the election in November, 1916, did not take effect until after 10 January, 1917, and cannot affect a statute, passed before the latter date, creating a road district and providing for a tax levy and bond issue for road improvement and maintenance.

7. Elections — Electors—Oath—Qualifications—Registrars—Judge of Elections.

The mere failure of the registrars to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. Constitution, Art. VI, secs. 1 and 2.

8. Elections—Irregularities—Statutes, Directory.

The object of election laws is to afford the qualified voters a fair and full expression of their wills; and where the result has been fairly obtained and without fraud, it will not be defeated by mere irregularities in conducting the election.

9. Elections—Votes—Presumptions—Illegality—Burden of Proof.

Where the vote of an elector has been received and deposited by the judges of the election, it is presumed to be a legal vote, with the burden upon the contesting party to show its illegality.

10. Elections—New Registration—Electors—Qualification—Statutes, Directory.

Where the statute authorizing an election for the establishment of a special road district requires a new registration for the purpose, and the

vote of an elector is received and deposited, it will not afterwards be held to be illegal if he is otherwise qualified to vote, though he may not have complied with the *minutiæ* of the registration law.

11. Elections—Electors—Oath.

It is not the duty of an elector to see that he is duly sworn, and that the registrars and poll holders observe the directory requirements of the statutes addressed to them.

12. Electors—Qualification—Evidence—Questions for Jury.

The rulings of the judge and his charge to the jury as to the qualifications of electors voting under the "grandfather clause" of the Constitution (Revisal, sec. 4331), and also of the ability of others to qualify by reading the Constitution, etc., are approved, the question being for the jury, under the evidence in the case.

13. Courts—Discretion—Evidence—Appeal and Error.

It is within the discretion of the trial judge to permit plaintiff's witness to testify to new matter after the defendant's evidence is closed, and not reviewable on appeal.

ACTION, tried before *Stacy, J.*, and a jury, at June Term, 1918, of WAKE.

This action was brought by the plaintiffs to enjoin the issuance of $130,000 of bonds, authorized by an election held on 27 February, 1917, pursuant to the provisions of chapter 68 of the Public-Local Laws of 1917, creating the Western Wake Highway District. The act provides that the bonds shall be issued if a majority of those voting at the election approve it. The act was duly passed in accordance with article 2, section 14, of the Constitution.

It was a new registration, and 379 voters were registered at the two precincts of Cary and Method. Of this number 231 voted for bonds and 133 voted against bonds and 15 did not vote. In the complaint and several amendments which were filed thereto the plaintiffs alleged that 104 of those who voted for bonds were disqualified. It appears that none of these voters were challenged on the day of the election or prior to the election.

The defendants, in their answer, alleged that of those who voted against highway improvement, quite a number were disqualified, and the plaintiffs in open court admitted that of those attacked by the defendants seven were disqualified, and deducted these seven from those who voted against bonds, leaving 126 votes cast against bonds.

If we deduct all the 104 voters attacked by the plaintiffs, and voting for bonds, from the total vote cast for bonds, it leaves 127, which is one majority of the votes cast, so that upon the final count it seems that a majority of one voted for bonds. This is set out fully in a part of the judge's charge, to which there is no exception, and under the charge

and the evidence the jury found, in answer to the second issue, that the election was carried by a majority of the qualified voters *voting*. The plaintiffs say that if this is conceded, the construction of the highway was not a necessary expense, and that, therefore, the bonds could not be legally issued unless they were carried by a majority of the registered, qualified voters.

To meet this contention of the plaintiffs, the court submitted to the jury the third and fourth issues, and the jury found, in answer to the third issue, that the election was carried by a majority of the registered, qualified voters, and in answer to the fourth issue, that this majority was seventeen. Of the 104 voters of the majority who were attacked by the plaintiffs, the defendants admitted that 57 of them were disqualified for various reasons and denied that the balance of 47 were disqualified. During the progress of the trial the defendants admitted that of the 47, the evidence had shown four to be disqualified, to wit: Donnie Crump, Jerry Hogan, Madison McCoy, and H. H. Waddell, leaving 43 voters in controversy which were attacked by the plaintiffs, and the qualifications of these 43 were submitted to the jury to be determined by them.

In addition to the seven who voted against bonds and who were admittedly disqualified, the defendants attacked thirteen others who voted against bonds and four who were registered but did not vote. Of this number the defendants, during the progress of the trial and after the evidence was introduced, admitted that the disqualification of four had not been shown, but the defendants contended that certain others (naming them) were disqualified, all of these voting against bonds except two, who did not vote. The qualifications of these voters who were attacked by the defendants were submitted to the jury to determine under the evidence and charge of the court.

The plaintiffs' brief discusses only the exceptions relating to the qualifications of all of the voters whose right to vote was attacked either by the plaintiffs or the defendants and raised several issues in the case. Of these there were eleven, four of whom voted against the issuing of bonds, and their qualifications were denied by the defendants, and the remaining seven voted for bonds and their votes attacked by the plaintiffs.

As the jury found that the election was carried by a majority of sixteen of the registered, qualified vote, it is apparent that even if the appellants should be right in their contention as to all eleven of said voters, there would still be a majority of such vote in favor of the bonds. It may, therefore, be unnecessary to consider these exceptions, but we will presently refer to them to some extent.

The following are the several grounds upon which the plaintiffs

allege in their complaint and amendments thereto that the act in question and the election held thereunder are invalid:

1. The plaintiffs contend in paragraph 6 of their original complaint that in order for the bonds to be lawfully issued, and the levy of a tax to be authorized, it is necessary that a majority of all the qualified voters of the district should have approved the same.

2. It is next contended by the plaintiffs, in section 9 of their complaint, that the act is invalid for the following reasons:

(*a*) The Legislature could not create this road district and include the incorporated town of Cary when the road to be improved comes only to the corporate limits of the town.

(*b*) The Legislature cannot create a road tax district to work only one highway in the district.

(*c*) The Legislature cannot pass an act creating a special road district and in said act direct that a highway already improved should be further improved.

(*d*) The Legislature cannot pass an act authorizing the board of commissioners of the town of Cary to appoint judges and pollholders of the election.

(*e*) The Legislature had no power to pass an act authorizing the levy of taxes and the issuance of bonds by a special tax district upon the vote of a majority of those actually voting at the election called thereunder.

3. In paragraph 11 of the original complaint it is alleged that the act is invalid for the reason that no provision is made for advertising the sale of the bonds and calling for bids and for selling the bonds to the highest bidder, but that the highway commissioners are given power and authority to negotiate and sell the bonds at such price, at or above par, as they, in their discretion, may deem best.

4. In the amendment to the complaint, which was filed on 3 April, it is alleged that the act is invalid because the constitutional amendments, which were adopted at the election of 1916, took effect in November of that year.

5. In the amendment to the complaint filed before the referee on 14 April it is alleged that the names of many persons were improperly placed upon the registration books of the road district because the registrars did not administer the oath to them and did not see some of the persons, but the names of the latter were handed by others to the registrars, who then entered the names on the registration books.

The following verdict was returned by the jury:

1. Was the act creating the Western Wake County Highway District passed in accordance with article 2, section 14, of the Constitution? Answer: "Yes." (Answered by consent.)

2. Was a majority of the qualified votes cast in the special election held on 27 February, 1917, "For Highway Improvement"? Answer: "Yes."

3. Did a majority of the registered, qualified voters resident in said Western Wake County Highway District vote "For Highway Improvement" in the special election held on 27 February, 1917? Answer: "Yes."

4. If so, by what majority of the registered qualified vote was said election carried? Answer: "Sixteen."

5. Was the election in said district conducted by the officials with such utter disregard of the requirements of law as to render same null and void? Answer: "No."

Judgment upon the verdict, and plaintiffs appealed.

Manning & Kitchin for plaintiffs.

J. Crawford Biggs, R. N. Simms, A. Jones & Son, Douglass & Douglass, Templeton & Templeton, Jones & Bailey, and W. R. Winston for defendants.

WALKER, J., after stating the case: We will now discuss the exceptions urged by the plaintiffs to the validity of the act and the election in the order we have stated them.

First. Is it necessary that the issuance of the bonds in question should be approved by a majority of all the qualified voters in the district?

The act under consideration provides that the bonds shall not be issued unless a majority of those in the district who are qualified and vote at the election shall decide in favor of them. The answer to this question depends upon whether the improvement of the public roads of a special road district in a county is a necessary expense, for if it is, the Constitution does not require that the question should be submitted to the voters of the district at all, but the Legislature, in creating a special road district, may provide that the bonds shall be issued (1) without a vote of the people (2) only after a majority of those voting have voted for the issuance of the bonds, or (3) only after a majority of all the qualified voters of the district have voted for the bonds; and in either contingency the bonds are valid obligations of the district, provided the statute creating the road district has been enacted by the Legislature in accordance with article 2, section 14, of the Constitution, which provides that a taxing bill shall be passed on three several days and the ayes and noes be recorded in the journal of each house upon the second and third readings, which is not denied in this case.

It is settled by many decisions of this Court that the construction and improvement of public roads are necessary expenses within the

meaning of the Constitution, and that the creation of a debt by the issuance of bonds for that purpose is not required to be submitted to a vote of the people under provisions of article 7, section 7, of the Constitution, and not unless so ordered by the Legislature.

One of the latest cases on this question is *Hargrave v. Comrs.*, 168 N. C., 626, where it was held that "the building of bridges and construction of public roads are necessary expenses of the county." *Comrs. v. Comrs.*, 165 N. C., 632. And it has so been repeatedly held by this Court. *Pritchard v. Comrs.*, 159 N. C., 636, and *Board of Trustees v. Webb*, 155 N. C., at p. 388, where the Court said: "It is well established with us that the construction and maintenance of public roads is a governmental purpose, and the cost thereof is a necessary expense to be paid for by current taxation or by issuing bonds, having regard always to the requirements and limitations of the legislation under which these local authorities are acting for such purpose, and unless the statute so requires, no election by the people is necessary." It appears in that case that the Legislature created a body corporate by the names of the Board of Road Trustees of Youngsville Township and authorized it to issue bonds of the township for working roads therein, without a vote of the people, and we held that the bonds issued were valid and binding obligations of the road district.

In *Hargrave v. Comrs., supra,* the Court said: "The construction and maintenance of public roads are a necessary expense, and the Legislature may provide for the same, and may create a board to do this distinct from the county commissioners, and fix and authorize the levying of taxes for that purpose, as is done in this act, without a vote of the people. We know of no reason to question the correctness of our former decisions."

We cannot, therefore, under the authorities, endorse as correct, or even look with favor upon, the contention of plaintiffs, that taxes cannot be levied or bonds be issued unless a majority of the qualified voters of the district should approve the same. The argument is clear and convincing from the provisions of the Constitution, as its premise, and leads us inevitably to the conclusion that the Legislature may authorize road bonds and a tax in a special district, and with or without a vote of the people. If with a vote, it may say how that vote shall be taken. This obviously follows from the possession of the general power to prescribe the rule of action.

Second. It is contended that the Legislature could not create this road district and include the incorporated town of Cary when the road to be improved only comes to its corporate limits.

We think that this contention is without merit. All of the town of Cary is within the road district, and gets the benefit of the road; but

we understand the contention is that, because Cary is an incorporated town, the property in it is immune from taxation for this road purpose. Is this so? The Constitution recognizes the existence of counties, townships, cities and towns as governmental agencies (*White v. Comrs.*, 90 N. C., 437), but they are all legislative creations and subject to be changed (*Daro v. Currituck*, 95 N. C., 189; *Harris v. Wright*, 121 N. C., 178), even abolished (*Mills v. Williams*, 33 N. C., 558), or divided and subdivided (*McCormac v. Comrs.*, 90 N. C., 441) at the will of the General Assembly, as we held in *Jones v. Comrs.*, 143 N. C., 59, and *Board of Trustees v. Webb*, 155 N. C., 379.

In *Board of Trustees v. Webb, supra,* the Court further says: "In *Smith v. School Trustees*, 141 N. C., 143, the Legislature incorporated a school district, confined territorily to portions of two existent townships, authorized the trustees of the district to issue bonds, levy and collect taxes, etc., and the court, after full and careful consideration, held that this power of the Legislature over counties, townships, etc., when acting as governmental agencies, was not confined to the ordinary political subdivisions of the State, but that it authorized and extended to creating special public *quasi* corporations for governmental purposes in designated portions of the State's territory, and that in the exercise of such power county and township lines could both be disregarded if such action was, in the judgment and expressed declaration of the Legislature, best promotive of the public welfare. And within the proper exercise of this power were included levee, school, drainage, road and highway and other special taxing districts."

In *McCormac v. Comrs.*, 90 N. C., 441, quoted with approval in *Board of Trustees v. Webb, supra*, *Merrimon, J.*, said: "That it is within the power and is the province of the Legislature to subdivide the territory of the State and invest the inhabitants of such subdivisions with the corporate functions, more or less extensive and varied in their character, for the purpose of government, is too well settled to admit of any serious question. Indeed, it seems to be a fundamental feature of our system of free government that such a power is inherent in the legislative branch of the government, limited and regulated, as it may be only by the organic law. The Constitution of the State was formed in view of this and like fundamental principles. They permeate its provisions, and all statutory enactments should be interpreted in the light of them when they apply. It is in the exercise of such power that the Legislature alone can create, directly or indirectly, counties, townships, school districts, road districts, and like subdivisions, and invest them, and agencies in them, with powers, corporate or otherwise in their nature, to effectuate the purposes of the government, whether these be local or general, or both. Such organizations are intended to

be instrumentalities and agencies employed to aid in the administration of the government, and are always under the control of the power that created them unless the same shall be restricted by some constitutional limitations." But this point has been squarely decided by us in *McLeod v. Comrs.*, 148 N. C., 77, at p. 85, where the Court says: "It is clear to us that the Legislature intended to establish a school district within the corporate limits of the town of Carthage and from a part of the territory of the said town for the purposes specified in the act, and that bonds should be issued, not by the town, but by the corporate authorities of the town, the board of commissioners, for and in behalf of the school district so created by the statute. It was perhaps considered more convenient and less expensive to have the board of commissioners, the treasurer, and the tax collector of the town perform the several duties and functions assigned to them than to provide for the appointment or election of officers within the school district for that purpose. We can see no objection to this method of administering the affairs of the district and to the procedure adopted in order to execute the purpose the Legislature had in view," citing *Smith v. School Trustees, supra.*

The case of *Jones v. Comrs.*, 137 N. C., 579, construes the powers of the Legislature over counties and municipalities to be very broad and far-reaching, giving to it practically full control of them.

Third. It is further claimed that the Legislature did not have the power to create a road tax district to work only one highway.

This was a matter in the discretion of the Legislature. It would be conceded, we suppose, that the Legislature could create a special road district and appoint the commissioners therefor, and authorize them to spend the money on the roads of the district in such manner as in their judgment is best for the district, and, under this power, the commissioners appointed could spend all the money on one road if they thought best. If they acted arbitrarily or corruptly, a different question might arise as to the remedy for a correction of their bad conduct, but there is no such question here.

In *Comrs. v. Comrs.*, 165 N. C., 632, the Court states that "the *routes* for the roads and their character are expressed in the act." If the contention of plaintiffs is that the Legislature could not authorize "a highway already improved to be further improved," then good roads would cease to be built because practically all the old highways have already been improved, more or less, and the improvement of the roads system would be confined to such new roads as are hereafter opened, or to the very few of the unimproved roads of the State. The truth is, that all of these matters are left to the sound judgment and discretion of the

local authorities, and they should be for very good reasons. *Hightower v. Raleigh,* 150 N. C., 569.

We could not give a better answer to several of the questions now under consideration than by quoting at some length the very practical and sensible views of the Court in *Brodnax v. Groom,* 64 N. C., 244, as stated by *Chief Justice Pearson.* That case, it will be remembered, was decided just after the adoption of the Constitution of 1868, which contained the same provision as the present one regarding taxation and the making of municipal contracts. It was there first stated that the Constitution, art. 7, sec. 7, provides: "No county, city, etc., shall contract any debts, pledge its faith, or lend its credit, nor shall any tax be levied or collected by any officers of the same, *except for the necessary expenses thereof,* unless by a vote of a majority of the qualified voters therein." The Court then proceeds to say: "In regard to contracting debts, pledging its faith, or lending its credit, there is an absolute prohibition, and this section is cumulative and adds another restraint to that of section 7, article 5, which we have been considering. When the prohibition is absolute, so as to take away the power, the courts can handle the subject; but the power to tax is assumed, and an attempt is made to restrain its exercise, 'except for the necessary expenses of the county.' Who is to decide what are the necessary expenses of a county? The county commissioners, to whom are confined the trust of regulating all county matters. 'Repairing and building bridges' is a part of the necessary expenses of a county, as much so as keeping the roads in order, or making new roads; so the case before us is within the power of the county commissioners. How can this Court undertake to control its exercise? Can we say such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge it should be erected as heretofore, upon posts, so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanence and be cheaper in the long run? In short, this Court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so without putting itself in antagonism as well to the General Assembly as to the county authorities and erecting a despotism of five men, which is opposed to the fundamental principles of our government and the usages of all times past. For the exercise of powers conferred by the Constitution, the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties. This Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitu-

tion upon the legislative department of the government, or upon the county authorities." That case has since been frequently approved by this Court.

Fourth. The contention that the Legislature could not authorize the commissioners of the town of Cary to appoint the registrars and poll-holders for the election is also untenable.

We do not recall any provision of our organic law which places any such restriction upon the power of the Legislature as is asserted in this contention, or rather involved in it. Granted the general power of the Legislature to act in the premises, and to provide for the formation of a special road district and, further, for the construction of a road from Raleigh to Cary, about seven miles in length, which power, we are of the opinion must be admitted, we do not see why the appointment of registrars and poll-holders, instead of being made by the Legislature directly, which is unusual, at least in practice, should not be committed to a local board previously constituted, as was that of the commissioners of Cary, by legislative sanction. Could not the Legislature itself have appointed these officers; and why not delegate this part of its soverign power, as it undoubtedly has legally done in other like cases, to a local board presumed to be fully capable and competent to exercise it? It has appointed other local boards for the same purpose in general elections, such as the State and county boards of elections. The town of Cary is a part of the road district, and if the Legislature could itself have appointed the individuals composing its board of commissioners for the designated purpose, why could it not appoint them because they were commissioners, and, therefore, presumed to be well qualified by their former public service to make and control the appointments of registrars and poll-holders. The fact that the individuals were members of the board was merely incidental, and not material, as the Legislature could have designated them as individuals to act together in making the appointment, without regard to their official character as members of the board of commissioners of the town. They were certainly none the less efficient because they held these offices.

Fifth. We have already considered this contention as to the power of the Legislature to prescribe that a majority of those qualified and voting for the measure shall be sufficient to put it in force.

Sixth. The Legislature undoubtedly had the power to provide how the bonds, if issued, should be sold or disposed of. This was a matter of detail, and it was well within the authority of the Legislature to leave this matter with the highway commissioners of the district by the provision "that they shall have the power to negotiate and sell the bonds at such price at or above par as they, in their discretion, may deem best." This also is a mere matter of administrative procedure which,

under *Brodnax v. Groom, supra,* may be left to the judgment of the local board.

Seventh. The amendments to the Constitution ratified at the election in November, 1916, do not affect this case, as we have decided that they took effect on 10 January, 1917, after this statute was passed (*Reade v. City of Durham,* 173 N. C., 668), even if the amendments themselves, if applicable, would change the result.

Eighth. It is contended by plaintiffs that the votes of electors otherwise qualified should be rejected because the registrars failed to administer the oath to them, and they were allowed to vote without being challenged.

This is answered by the Court in *Quinn v. Lattimore,* 120 N. C., at p. 430, where it is said: "Article 6, section 1, prescribes the qualifications of an elector, and section 2 of this article is a disabling clause (*R. R. v. Comrs.,* 72 N. C., 486; *Norment v. Charlotte,* 85 N. C., 387) placed in the hands of the registrars for their guidance in performing the duties of their respective offices. A qualified elector cannot be deprived of his right to vote and the theory of our government, that the majority shall govern, be destroyed by either this willful or negligent acts of the registrar, a sworn officer of the law. This would be self-destruction—government suicide."

It is said in McCrary on Elections (3d Ed.), at sec. p. 143, sec. 216: "In the courts of the country the ruling has been uniform, and the validity of the acts of officers of election, who are such *de facto* only, so far as they affect third persons and the public, is nowhere questioned. The doctrine that whole communities of electors may be disfranchised for the time being and a minority candidate forced into an office because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the decisions of our judicial tribunals. We here refer to some of the leading cases." And at section 197 it is further said: "In determining this and similar questions, in cases of contested elections, it should be kept constantly in mind that the ultimate purpose of the proceeding is to ascertain and give expression to the will of the majority, as expressed through the ballot box and according to law. Rules should be adopted and construed to this end, and to this end only." See, also, sections 201 and 204.

In *DeLoatch v. Rogers,* 86 N. C., 357, at p. 360, it is said by the *Chief Justice:* "It is a well-settled rule in contested elections, scarcely needing a reference to authority for its support, that the result will not be disturbed, nor one in possession of an office removed, because of illegal votes received or legal votes refused, unless the number be such that the correction shows the contesting party entitled thereto. If the

obnoxious ballots ought to have been counted for the relator, and yet are insufficient to overcome the majority ascertained by the count actually made, the election will stand and the occupant of the place left in unmolested possession of it."

Irregularities are alleged in the conduct of the registrars and pollholders, and it is shown that many were registered and voted who were not entitled to this right. There were some of these who voted for bonds, and others, but not so large a number, who voted the other way. It would be useless to enter into lengthy details or to comment specially on the numerous complaints in regard to these irregularities. A few general principles settled by our decisions will suffice to cover the entire ground.

Concerning this kind of legislation, it may be said that the object of the law—a fair and full expression of the will of the qualified voters—must be kept in mind. And if this has been obtained, and no fraud appears, this Court does not look for mere irregularities to defeat this will. *R. R. v. Comrs.,* 116 N. C., 563; *McDonald v. Morrow,* 119 N. C., 666; *Harkins v. Cathey,* 119 N. C., 649. But what may be a good reason for not allowing a party to register is not always a good reason for rejecting his vote after it has been cast. A vote received and deposited by the judges of the election is presumed to be a legal vote, although the voter may not actually have complied entirely with the requirements of the registration law; and it then devolves upon the party contesting to show that it was an illegal vote, and this cannot be shown by proving merely that the registration law had not been complied with. Pain on Elections, sec. 360. A party offering to vote without a regular registration, under some circumstances, may be refused this right by the judges for not complying with the registration law, but if the party is allowed to vote and his vote is received and deposited it will not afterwards be held to be illegal, if he is otherwise qualified to vote. Pain on Elections, sec. 361. We need not say what the rule would be if a majority of registered voters is required. Where a voter has registered, but the registration books show that he had not complied with all the minutiæ of the registration law, his vote will not be rejected. Such legislation is not to be regarded as hostile to the free exercise of the right of franchise, and should receive such construction by the courts as will be conclusive as to a full and fair expression of the will of the qualified voters. Pain on Elections, *supra; Quinn v. Lattimore,* 120 N. C., 426. The case of *Quinn v. Lattimore, supra,* considers these questions quite fully and answers conclusively many of the objections herein made.

In *DeBerry v. Nicholson,* 102 N. C., 465, it is said: "Statutes prescribing rules for conducting popular elections are designed chiefly for

the purpose of affording an opportunity for the free and fair exercise of the right to vote. Such rules are directory, not jurisdictional or imperative. Only the forms which affect the merits are essential to the validity of an election or the registration of an elector. An irregularity in the conduct of an election which does not deprive a voter of his rights, or admit a disqualified person to vote, which casts no uncertainty on the result, and which was not caused by the agency of one seeking to derive a benefit from the result of the election, will be overlooked when the only question is which vote was the greatest. The same principles are applicable to the rules regulating the registration of electors. The vote given at a polling place must not be rejected because of a disregard of those directions contained in the Constitution or statutes (except as to the time and place of holding the election), the nonobservance of which amount to mere irregularity. The same principle governs the registration of electors. The registration of an elector who is qualified to vote must be accepted as the act of a public officer and entitles the elector to cast his vote." And again, in the same case: "But it ought to appear, to warrant this, that none of those voting were regularly and properly sworn; for it is no reason to deprive a qualified voter of his vote that another has been registered who ought not to have been and has no right to vote. In such case the list should undergo expurgation, and those of the latter class (not qualified) stricken from the number given to the candidate for whom, when ascertained, the illegal votes were cast, for it is equally the right of the candidate receiving lawful votes to have them counted as for the opposing candidate to have those that are not lawful rejected from the count."

It is said in 15 Cyc., pp. 372, 373: "Where an election appears to have been fairly and honestly conducted it will not be invalidated by mere irregularities which are not shown to have affected the result, for, in the absence of fraud, the courts are disposed to give effect to elections when possible. And it has been held that gross irregularities not amounting to fraud do not vitiate an election. . . . But the power to throw out an entire division is one which ought to be exercised with the greatest care and only under circumstances which demonstrates beyond all reasonable doubt that the disregard of the law has been so fundamental or so persistent and continuous that it is impossible to distinguish what votes are lawful and what are unlawful, or to arrive at any certain result whatever, or where the great body of the voters have been prevented by violence, intimidation, and threats from exercising their franchise."

The case of *Gibson v. Comrs.*, 163 N. C., 510, approves the case of *Quinn v. Lattimore, supra*, and holds that it is the duty of the registrar to administer the oath to the electors before registration, but that his

failure to perform this duty will not deprive the elector of his right to vote, and that where the registrar has failed to administer the oath to any one of the electors voting in an election the election will not be held invalid on that account. It cannot be successfully contended that it is the duty of the voter to see that he is duly sworn, and that other directory requirements are properly observed, for this Court has said more than once that these provisions of the statute are addressed to the registrars and poll-holders.

Again referring to *Quinn v. Lattimore, supra,* the Court there says: "This provision of the Constitution that no one shall be entitled to register without taking an oath to support the Constitution of the State and of the United States is *directed to the registrars.* It must be to them, and to them alone, as is said by this Court in *Southerland v. Goldsboro,* 96 N. C., 49." And this is repeated in *Gibson v. Comrs., supra,* where it was held: "The fact that the registrar of elections did not administer an oath to any of the electors whose names were registered in the register book would not invalidate an election to determine whether a school tax should be levied, in absence of fraud or improper motive."

The same was stated by the Court of a sister State in *Rowl v. McCown,* 97 S. C., 1 (81 S. E., 958), where it was held: "The entire registration of electors will not be held invalid because the registration officers failed to apply the tests of qualification prescribed by the Constitution and statutes, and to administer the prescribed oath to those applying for registration."

We have considered nearly all the questions, and quite all that are material, in *Hill v. Skinner,* 169 N. C., 405, and *Hardee v. Henderson,* 170 N. C., 572. We then held, relying principally upon *Wood v. Oxford,* 97 N. C., 227, and *Riggsbee v. Durham,* 99 N. C., 341, as follows: "There is no presumption against the validity of an election; the presumption, if any at all, is the other way. The formal and official declaration of the result is *prima facie* evidence of its correctness, and the burden is upon him who asserts the contrary; and the crucial question is, What was the true result, and did a majority of the qualified voters of the town (Durham and Oxford) vote for the schools in the one case or the issue of bonds in the other? And if this were the case, the alleged irregularity would not defeat or avoid the election.

This Court said in *Quinn v. Lattimore,* 120 N. C., 432: "The object of the law—a fair and full expression of the will of the qualified voters—must be kept in mind; and if this has been obtained, and no fraud appears, we will not look for more irregularities to defeat their will." And in *Hampton v. Waldrop,* 104 N. C., 453, where there was an irregularity in the conduct of the registration, it was held that it would not

vitiate the election if everything was fairly done and a fair opportunity to vote given, and no one voted whose name did not appear on the registration book, or who was not entitled to vote, and no one who was entitled to vote was excluded." Those cases go fully into the law of this subject, and we refer to them without much further comment.

McCrary on Elections, sec. 190, says: "For the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statutes must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature. See, also, *Briggs v. Raleigh,* 166 N. C., 149, where *Justice Brown,* in a clear discussion of these questions, says, after referring to *Deberry v. Nicholson, supra:* "Statutes prescribing rules for conducting popular elections are designed chiefly for the purpose of affording an opportunity for the free and fair exercise of the right to vote. Such rules are directory, not jurisdictional or imperative. Only the forms which affect the merits are essential to the validity of an election or the registration of an elector," and adds these significant words: "An irregularity in the conduct of an election which does not deprive a voter of his rights or admit a disqualified person to vote, which casts no uncertainty on the result, and which was not caused by the agency of one seeking to derive a benefit from the result of the election will be overlooked when the only question is which vote was greatest. The same principles are applicable to the rules regulating the registration of electors," and then quotes with approval McCrary on Elections, sec. 190, as follows: "If, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the merits of the election."

We approve the rulings of the judge as to those voters who were challenged by the plaintiffs because of failure to pay their poll tax; as to Peter Cain, who was placed on the permanent registration roll under the Constitution and Revisal, sec. 4331; as to C. E. Hicks and L. O. Wood and P. S. White and the others specified by the plaintiff's exceptions. There was some evidence to support the charge of the court as to these parties, and it resolves itself virtually into a question of fact as to their qualification or disqualification.

The jury found that there was a majority of those who were qualified and voted in favor of the road scheme, and even a majority of the registered voters otherwise qualified, if that was required. (See *Wood v.*

Oxford, 97 N. C., 228.) These are the essential findings to authorize the issue of bonds for the purpose specified in the statute.

But we have had more difficulty in approving the ruling of the court upon the right of the plaintiffs to ask the question of Mortell Jones, their witness, on examination of him in rebuttal of defendant's evidence. The question was whether he could read and write. This disqualification was not alleged in plaintiffs' bill of particulars, it being charged that he was bribed to vote as he did. The court sustained defendants' objection to the question upon the ground that the witness was offered in rebuttal, after the plaintiffs had rested, and the defendants had done the same, and because this disqualification was not specifically mentioned in the pleadings or list of voters alleged to be disqualified. The proposed testimony of this witness was offered in rebuttal, but was not confined to that purpose, as it contained entirely new matter which was not strictly or even substantially in reply to defendants' testimony. McKelveyon Evidence (2d Ed.), at pp. 387, 388, thus states the ordinary method regarding the examination of witnesses: "The successful and orderly administration of justice requires that some system be followed in the introduction of testimony upon a trial, and a uniform system has grown up, a system which has satisfied the English and American idea of fair play. It is, in brief, that each party shall have his say—*i. e.,* put forward his case by his witnesses—and shall complete it without interruption except by cross-examination. The trial thus proceeds by stages until the issues are exhausted. The plaintiff usually begins and must put in his whole case; that is, all the testimony which he intends to offer to support the claims he has made. The defendant then proceeds to put in all the testimony which he has to disprove the facts as shown by plaintiff's witnesses, and if there is an affirmative defense, to support the facts set up in his pleadings. The plaintiff then again takes up the work and is permitted to put in what testimony he has to explain, qualify, or contradict any matter in the defendant's testimony; but he cannot add to his original case. The parties may thus proceed by alternate stages as long as the court, in its discretion, deems anything will be gained in the clarifying of the issues. As a practical matter, the case is usually confined to three or, where there is an affirmative defense or counterclaim, four stages. The regular order of proof may be, and frequently is, departed from by the court. In particular cases the circumstances may prevent the production of a witness by the plaintiff at the proper time, and he may be allowed to examine him after the defendant has put in the whole or part of his case. The court is not bound to allow any departure from the ordinary methods of proceeding. It is simply a matter of discretion, and therefore not a ground for assignment of error." And virtually the same rule is adopted in

Dupree v. Ins. Co., 93 N. C., 237, and in *S. v. Lemon*, 92 N. C., 791, where *Justice Merrimon* says: "When the defendant closed the introduction of evidence on his part, then the State had only the right to introduce rebutting evidence and evidence strictly to strengthen and support that offered at first to prove the allegations in the indictment. After this no further evidence could be introduced on either side of the action except in the discretion of the court. In case any injustice was likely to result from any inadvertence, mistake or misapprehension on either side, the court might—in some cases ought to—allow further evidence to be introduced, being very careful to give neither side undue advantage over the other. That indicated above is the orderly course of trial; any other would protract it indefinitely and lead to interminable confusion. If, however, the court should allow a material departure from the rule on either side, the opposing party would have the right to introduce further pertinent evidence in corresponding degree."

Applying this well-settled rule of practice to this case, we find that while the judge might well have permitted the plaintiffs, in a case of this kind, where public interests are involved, to examine the witness, as they proposed to do, he had the discretion to refuse this privilege, and it was exercised, and is not reviewable by us, as we cannot say that it was abused. The plaintiffs were allowed considerable latitude in amendments and otherwise, and they cannot well complain that in this particular instance the judge ruled adversely to them. He did it, no doubt, because he thought that the examination was being needlessly protracted. If we did not agree with the learned judge in this respect, nor in the other one, that the rule should not have been so strictly enforced when public interests are involved, it would be no reason, in law, why we should reverse, as he was acting strictly in the exercise of his discretion, and there was no abuse of it.

It may be, as suggested, that the testimony of the witness was of such a character that it would not have taken the other party by surprise, or put it at a disadvantage, but the rule was adopted not merely to avoid any such result, but also for the reason that as the party who offers the witness has once had a fair opportunity to elicit the evidence he desires to put before the jury he will not be allowed to do so in rebuttal, except in the sound discretion of the court, which will be exercised according to the particular circumstances. If it had been made to appear that the fact proposed to be proved had just come to the knowledge of the plaintiffs, the judge perhaps would have been more favorable to them; but these matters we have to leave with the judge under all of our precedents. We may clearly see the importance of this testimony if the witness would have given a negative answer, but as the ruling is not reviewable by us we can grant no relief, and, therefore, it

is not necessary to further consider it, except to say that it does not appear what answer the witness would have given if he had been permitted to testify.

Our conclusion, after a careful review of the record, was that there is no error in the trial of the cause.

No error.

E. A. HANNAH v. BOARD OF COMMISSIONERS OF STOKES COUNTY.

(Filed 6 November, 1918.)

1. **Pensions—Confederate Soldiers—Burial Expenses—Charge Upon County—Statutes.**

   Revisal, sec. 5005a, requires the $20 on account of the burial of a Confederate pensioner to be paid by the board of commissioners of the county on the pension roll of which his name appears, irrespective of residence. The delay in the decision of this case unfavorably commented on.

2. **Statutes—Interpretation—Attorney-General—Long Acquiescence.**

   The opinion of the Attorney-General, interpreting a statute, sanctioned by long acquiescence and without legislative change, is entitled to respectful consideration by the courts.

APPEAL by plaintiff from *Harding, J.,* at Spring Term, 1918, of STOKES.

J. H. Folger for plaintiff.
N. O. Petree for defendant.

CLARK, C. J. This action was begun before a justice of the peace, and on appeal to the Superior Court was heard upon an agreed state of facts.

The plaintiff seeks to recover the sum of $20 of the Board of Commissioners of Stokes County for the burial of George S. Rogers, who was a Confederate veteran and on the pension rolls of that county. The plaintiff buried the soldier and presented his account for $20 to the chairman of the Pension Board of Stokes, who approved the claim, and the clerk certified that the soldier was at the time of his death on the pension roll of Stokes. He added to the certificate that there were two men on the pension roll by that name, and that this man was left on the pension roll of Stokes after he had moved to Surry. The soldier died in Surry, where he had lived some years, and was buried there. The commissioners of Stokes refused to pay the account.

Revisal, 5005a, provides: Whenever in any county of this State "a

Confederate pensioner on the pension roll of said county shall die," it shall be the duty of the board of commissioners of such county, upon the certificate of said fact by the clerk of the Superior Court and recommendation of the chairman of the pension board of said county, to order the payment out of the general fund of the county of a sum not exceeding $20 to be applied towards defraying the burial expenses of such deceased pensioner.

The soldier having died while still on the pension roll of Stokes, it would seem clear, upon the language of the statute, that upon the recommendation of the chairman of the Pension Board of that county and the required certificate of the clerk of the Superior Court that payment should have been ordered by the commissioners of Stokes.

In contemplation of the statute, the fact is not material in what county the pensioner died, but "on the pension roll of what county" he was a pensioner. Instances like this, where the pensioner on the roll of one county has died in another have been not infrequent. Years ago the State Auditor submitted to the Attorney-General the same question as to what county should pay $20 for the burial expenses of a soldier on the pension roll of Rutherford who had been a resident of that county, but for a few years prior to his death had lived with a son in Union and a daughter in Anson, and had died in Anson. The Attorney-General advised that such expenses, not exceeding $20, should be paid by the commissioners of Rutherford, "as this is required by the express language of section 5005a of the Revisal."

This, we are informed, has been the uniform practice since. While this is not compelling authority, the advice of the Attorney-General and the uniform custom observed by the pension authorities and the State Auditor are entitled to respectful consideration. Besides, as it has been the uniform custom, the fact that the legislative department of the government has made no change in the language of the statute is entitled to weight as a legislative construction that such was the intent and proper construction of the act.

Doubtless the defendant board thought it was doing its duty in refusing payment, but the county of Stokes, which has earned so much fame by the heroic conduct of the brave men who risked their lives cheerfully at the call of the State and county, should have been slow to show reluctance to pay the petty sum of $20 for the decent burial of one of her gallant sons. His name having been retained on the pension roll of Stokes, whether this was done by mistake or not, it is certain that payment for his burial expenses could not have been collected out of the county of Surry, for he was not "on the pension roll" in Surry, and if the action of the defendant board was legal, the burial expenses of the deceased veteran would have fallen upon the plaintiff, who gave him

the honor that was due him of a decent burial. The defendant board doubtless did not wish this, but was inadvertent to the fact that, under the statute, payment for the burial charges could fall only upon the county on the pension roll of which the soldier was a pensioner.

The burial took place 28 February, 1915, almost four years ago, and after defendant refused to pay, this proceeding was begun 16 June, 1916, and has only reached this Court for decision after the lapse of two years and four months. If an action of this kind should have been forced at all by the refusal of the defendant board to pay, there is no reason why it should not have been presented in this Court two years ago. The case required no evidence, for the facts were agreed, and no investigation of the law beyond the statute itself was necessary. Such delays are inexcusable. The court costs and the interest on the delayed payment will probably more than double the principal amount which the county was called upon to pay. In the meantime, the worthy citizen who made the payment has been without reimbursement of the modest sum which he paid out years ago.

Reversed.

SOUTHERN MIRROR COMPANY v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 6 November, 1918.)

1. **Railroads— Negligence— Evidence— Cars at Grade— Proximate Cause— Questions for Jury—Nonsuit.**

Where the evidence tends to show that the defendant railroad company left its cars on a siding where it knew children were in the habit of playing, unlocked and insecurely blocked to prevent their rolling down a steep grade; and several children, on the occasion complained of, unblocked the cars, which ran down the grade and struck and injured plaintiff's team while being loaded according to his custom, of which the defendant had knowledge; that the defendant had failed to provide a derailer, which would have avoided the injury, and its cars, so placed, had on other occasions ran down this grade, causing damage under like circumstances: *Held*, sufficient to show defendant's actionable negligence, and its proximate cause of the injury, to take the case to the jury.

2. **Same—Intervening Negligence.**

Where cars negligently left by defendant railroad company at a down-grade have been set in motion by children accustomed to play there, and cause damage to the plaintiff's property, the defense of intervening negligence is not available.

3. **Railroads—Negligence—Third Persons—Concurring Causes—Actions.**

Where defendant railroad company's negligence concurs with that of another, in setting cars, left at a down-grade, in motion, to the plaintiff's

injury, the concurrent act of the other party will not relieve the defendant of liability.

APPEAL by plaintiff from *Lane, J.*, at September Term, 1918, of FORSYTH.

This was an action for injuries to property caused by the negligence of the defendant, tried before *Starbuck, J.*, at June Term, 1918, of the County Court of Forsyth. The jury found all the issues in favor of the plaintiff and assessed his damages at $700. On appeal by defendant to the Superior Court, before *Lane, J.*, at September Term, 1918, of Forsyth, he found error in the proceedings below and held that the motion for nonsuit should have been sustained and dismissed the action. From this judgment the plaintiff appealed.

Manly, Hendren & Womble for plaintiff.
Theodore W. Reath and Craige & Vogler for defendant.

CLARK, C. J. This is an action for damage to the plaintiff's property by certain cars standing upon a siding on the defendant's road in a few feet, or on the edge, of a heavy grade, which, being set in motion by the action of a negro boy in releasing the brake and removing the brick with which it was blocked, ran violently down said grade.

On 27 April, 1917, the plaintiff's wagon with two horses hitched to it was standing by the plaintiff's platform, on which were being loaded mirrors and glass, when three box cars loaded with lumber which had been left by the defendant on the side track near the top of the grade above the plaintiff's plant tore down the steep track and, striking plaintiff's wagon, dragged the wagon and team through the heavy gate, demolishing the wagon and harness, breaking and damaging several mirrors, and badly injuring the two horses.

It was in evidence that there was no derailer or other devise to stop cars, such as are in general use; that this grade was steep and dangerous, and that on former occasions while the cars were being shifted on said siding cars had gotten away and had run down this grade by the plaintiff's warehouse as on this occasion. Also, that a large number of colored people lived near this siding, and that boys and children were accustomed to play about the place where these cars were left; but that the defendant notwithstanding its knowledge of this fact left three loaded cars standing near the top of said grade and failed to provide derailers or other device to prevent the cars starting, and did not lock the brakes nor securely chock the wheels.

Essick Fields, a colored boy 16 years old, who started the cars in motion, testified that he and two other little darkies were playing on these box cars; that all three of them went on top of the cars and turned

the brakes loose, and then put them back; that then they came down and took the brick out from under the wheel and then they stuck it back, but the cars, which had started, smashed the brick and kept on down the grade. He further testified, on cross-examination, that when he and his companions went up on the cars he loosened one brake on the middle car; that it was not tight at all and he had no trouble in getting it aloose; that the brick chock under the wheel of the front car was a small-sized brick and he pulled it out easily with his hand; that there was no other chock on the wheel; that when he pulled the brick out the car started rolling; immediately he put the brick back, but the car smashed the brick into sand and went on; that he was the biggest of the three. His younger brother testified that the cars didn't start when they took the brakes off, but as soon as they took the brick out the cars started rolling; that though he put the brick back under there the car just smashed the brick up and went on.

Judge Starbuck, in charging the jury, told them that if they found that the cars were fastened with such care as the circumstances required, unless tampered with, to answer the issue as to negligence "No," unless the jury should find: (1) That the defendant knew or could have known, in the exercise of ordinary care, that children had been (in the habit of) playing around the cars; (2) that the defendant company had reason to apprehend that the boys were likely in their play to tamper with and loosen the fastening of the car; (3) that the defendant failed to exercise the care in fastening the cars that this knowledge demanded, and (4) that if due care had been exercised the cars would not have been loosened by the children and the injury caused to the plaintiff's property.

The jury found that the property of the plaintiff was injured by the negligence of the defendant, as alleged in the complaint; that plaintiff did not contribute to the injury to its property by its own negligence, as alleged in the amended answer, and that the plaintiff was entitled to recover $700.

The above states the essential facts, and the jury were justified upon the evidence in finding that the defendant was guilty of negligence. It had three cars on the siding upon or near the edge of a steep grade above the plaintiff's platform, where he was in the habit of loading and unloading furniture, of which fact the defendant was aware.

It was in evidence also that of the three cars on this siding only two were tied—*i. e.,* had the brakes "set"; that the defendant knew that numerous children lived in the neighborhood, and that many of them were in the habit of playing around this siding; that the brakes were not locked, and that the only chock was one small brick, which was insufficient to stop the cars when they began to roll down the siding, and that by reason of the cars getting away and the failure of the defendant

to have a derailer to keep the cars from smashing into defendant's wagon and team, injury to them and also damage to the furniture loaded therein resulted.

This is not the case of an injury caused by an intervening negligence, independent of the defendant's negligence, and without which an injury would not have occurred, but the negligence of the defendant furnished the means by which thoughtless children, without malice or intent, started the cars in motion, which wrecked the plaintiff's property. The defendant should have foreseen this and guarded against such occurrence.

The witness Kinney, one of the defendant's brakemen, who assisted in placing these cars, testified that he had seen children on cars on this siding three or four times, and that cars had gotten from under control of the train crew and run down this grade doing damage prior to this time, and that on one occasion two cars had gotten loose and run down the grade in the night-time when no members of the crew were present.

There were other exceptions, but they do not require discussion. The chief controversy, as stated in both briefs, is whether or not the defendant's motion for judgment of nonsuit should have been sustained. The defendant contends that it was not an insurer, which is true; still it was liable for injury to plaintiff's property, caused by its negligence, as found by the jury upon sufficient evidence of proximate cause.

It is true that the act of the boy or boys in removing the brick chock preceded the starting of the car, but the position of the cars on a slight grade, near the edge of a steeper grade, insufficiently secured by brakes which were not locked, and without safe chocks, transmuted the force of gravity into motion and was the latest and proximate cause. If the cars had not been on a grade, negligently secured, the boy could not have started them. But if the act of the boy and the negligence of the defendant were concurrent, then the plaintiff could sue both or either. *Ridge v. R. R.*, 167 N. C., 510.

Upon consideration of all the grounds assigned in the judgment of *Lane, J.*, in the Superior Court, we think the judgment should be reversed, and that of *Starbuck, J.*, in the County Court, should be reinstated and affirmed.

Reversed.

JAMES F. YATES ET AL. v. DIXIE FIRE INSURANCE COMPANY.

(Filed 13 November, 1918.)

Appeal and Error—Fragmentary Appeals.

The Court suggests that fragmentary appeals be not permitted.

APPEAL by defendants from judgment of *Adams, J.*, at April Term, 1918, of GUILFORD.

R. C. Strudwick, W. P. Bynum, Frank Nash, and J. S. Manning for plaintiffs.

Brooks, Sapp & Kelly for defendant.

BROWN, J. This case was before us last term and is reported 173 N. C., 473. The appeal was dismissed because premature, but an opinion was rendered, as is sometimes done, to facilitate a disposition of a case. That opinion is authoritative and disposes of this case, and holds that plaintiffs cannot recover.

We suggest to the judges of the Superior Court that fragmentary and premature appeals be not permitted. It is best that all the issues be determined and a final judgment rendered before a case is brought to this Court.

Action dismissed.

J. W. PAYNE v. A. R. THOMAS.

(Filed 13 November, 1918.)

Slander—Bastardy—Indictable Offense—Pleadings—Demurrer.

Allegations that the defendant spoke false, slanderous, and defamatory words of the plaintiff, that a certain woman said that he was the father of her child, are those charging bastardy, and, though involving moral turpitude, is not an indictable offense carrying with it infamous punishment; and upon the failure of the complaint to allege special damages, it is demurrable.

ACTION heard upon demurrer by *Shaw, J.*, at September Term, 1918, of GUILFORD.

The demurrer was overruled. Defendant appealed.

W. P. Bynum and R. C. Strudwick for plaintiff.

S. B. Adams and Brooks, Sapp & Kelly for defendant.

BROWN, J. Plaintiff sues to recover damages for slander. The complaint charges that defendant spoke of and concerning the plaintiff cer-

tain false, slanderous and defamatory words, viz.: "Mamie (meaning the said Mamie Thomas) says that Payne (meaning the plaintiff) is the father of her child"; and also, at the same time and place, defendant spoke of and concerning the plaintiff, in the presence and hearing of the said Munford Huffines, the false statements and defamatory words, in substance as follows, to wit: "Payne (meaning the plaintiff) came over about some tobacco. He (meaning the plaintiff) got it then. He (meaning the plaintiff) went off to the pack-house and stayed about half a day and got it again, and then went home. Payne (meaning the plaintiff) was drinking. She (meaning the said Mamie Thomas) would or could take the baby to Payne's house (meaning the home where plaintiff and his family lived) and say, 'Here is me and my baby. What are you going to do with us?' "

The defendant demurred, because the complaint fails to allege and to set out any special damage.

The words recited in the complaint are not *per se* actionable. They do not of themselves charge an indictable offense involving moral turpitude.

They charge in substance bastardy, which is not an indictable offense and does not carry with it infamous punishment, although they involve moral turpitude. *Jones v. Brinkley,* 174 N. C., 24; 25 Cyc., 270.

Bastardy is a *quasi* civil proceeding to enforce a police regulation. *S. v. Addington,* 143 N. C., 683; *S. v. Curry,* 161 N. C., 275.

In order to recover, plaintiff must allege and prove special damage.

In the leading case of *Osborne v. Leach,* 135 N. C., at page 632, *Clark, C. J.,* discusses actual damages, punitive damages, and special damages as related to actions for libel and slander. This opinion shows clearly that special damages are pecuniary loss—direct or indirect—and that damages for physical pain and inconvenience, damages for mental suffering, and damages for injured reputation are actual damages and such as the law presumes from publications libelous *per se.*

In this case it is said: "Damages for mental suffering are actual or compensatory; they are not special nor punitive." (Page 634.) *Fields v. Bynum,* 156 N. C., 418.

The demurrer is sustained. The plaintiff will be allowed to amend his complaint.

Error.

S. L. PARRISH, ADMR. OF G. F. PARRISH, v. R. P. RICHARDSON.

(Filed 13 November, 1918.)

1. Master and Servant — Employer and Employee — Safe Place to Work— Negligence—Mines.

The plaintiff's intestate, a miner in the defendant's employment, was upon a ladder in defendant's 550-foot shaft, 475 feet from the bottom, and was struck and thrown down to his death by one or more other miners falling upon him. There was evidence tending to show that, had the ladders leading down into the mines been properly arranged 100 feet from the bottom, with platforms at certain intervals, with alternating holes, through which the ladders leading further below could be reached, the falling of the other employees upon the intestate would have been prevented, and that the platforms above described were ordinarily used in properly constructed mines: *Held*, sufficient to be submitted to the jury upon the question of defendant's actionable negligence and its being the proximate cause of the injury.

2. Master and Servant — Employer and Employee — Negligence—Notice— Knowledge—Principal and Agent—Vice Principal.

Where there is evidence tending to show the defendant's negligence in failing to provide platforms in his 550-foot shaft to his mine for a distance of 100 feet from the bottom, and that the death of the plaintiff's intestate, a miner therein, was thereby caused, testimony that the witness told the defendant's underground foreman, three weeks before the injury, that the shaft should be finished by putting in the partitions and platforms, and his reply that he did not have the lumber to finish it, is competent to show that the defendant was previously made aware, through his vice principal, of the dangerous conditions, and fixed him with knowledge thereof, and was not objectionable as being a narrative of a past transaction occurring after the injury. *Southerland v. R. R.*, 106 N. C., 100, cited and distinguished.

ACTION tried before *Shaw, J.*, at July Term, 1918, of DAVIDSON.

The intestate was killed by being thrown from the ladder-way of the Rich-Cog Mine, a gold mine in Montgomery County, belonging to and operated by defendant. The issues of negligence, assumption of risk, and damage were submitted to the jury, who found them against defendant and assessed damage at $4,000, which, by consent, was reduced to $2,500. From the judgment rendered defendant appealed.

J. C. Bower and J. R. McCrary for plaintiff.
Brooks, Sapp & Kelly for defendant.

BROWN, J. The intestate was employed as a miner by defendant, and on 9 August, 1917, was killed by being knocked off the ladder-way running down the shaft from the surface of the earth to the bottom of the mine, a distance of about 550 feet. The allegation of negligence is substantially as follows:

That the intestate was descending the ladder-way in the mine, and was at the time about the depth of 475 feet, when suddenly another employee of the defendant, Peter Green, fell from the ladder-way, above the intestate, onto another employee of the defendant, one Arch Davis, knocking him from the ladder-way, and that as a consequence one or both of said named employees fell on the intestate, knocking him from the ladder and hurling him a distance of some 75 feet to the bottom of the shaft, and thereby crushing his head and body, in consequence of which he died within about one and one-half hours thereafter.

That the injury and death of the intestate as above set out was caused by the carelessness and negligence of the defendant and his agents and employees in the following particulars:

That the defendant failed to provide proper platforms for the last 100 feet of the shaft in said mine, which was about 500 feet deep at that time; that for the first 450 feet various platforms were provided for the use and protection of the employees in going to and from their work, each platform being of heavy planking, and the platforms being about 25 or 30 feet apart and covering the shaft opening, with a ladder hole opening at alternate sides of each successive platform, so that if any object should fall from any upper part of the ladder it would be unable to fall further than the next platform below it, and that if these platforms had been provided for the last 100 feet of the shaft, when the employees, Peter Green and Arch Davis, fell from the ladder they would have either fallen on another platform which should have been placed a short distance below them, and not have struck the intestate at all, or if they had struck him he would have fallen on the needed platform and would not have been thrown to the bottom of the shaft and killed.

The defendant excepted to the testimony of Walter Parrish, a miner, that he said to Russell, the underground foreman of the mine, three weeks before intestate was killed, that the shaft ought to be finished by putting in the needed partitions and platforms; that Russell replied that it ought to be finished and the remaining platforms put in, but that he did not have the timber then to finish it.

We think this evidence competent to fix knowledge upon the part of defendant of the condition of the ladder-way. Russell was his representative and vice-principal, and the witness, a miner, made complaint to him. This was three weeks before intestate was killed, and yet no effort whatever appears to have been made to construct the needed safety platforms.

This declaration of Russell was not a narrative of a past transaction and made after the injury, as in *Southerland v. R. R.*, 106 N. C., 100. It was notice to Russell of the damage, and it was proper to introduce the entire conversation, showing why the platforms had not been constructed.

The declaration was made in the line of duty by the foreman, and is as competent as if made under similar circumstances by the principal. *Younce v. Lumber Co.*, 155 N. C., 239; 10 Cyc., 647; *McEntyre v. Cotton Mill*, 132 N. C., 599.

The motion to nonsuit was properly overruled.

The manner in which a ladder is constructed in all well managed mines is thus described by witness Hill, a miner of forty years experience in England and this country:

"When we make a ladder-road down the shaft, instead of putting one continuous ladder-way, we alternate and go down for 20 or 25 feet. We extended the ladder down about 25 feet onto a platform, and on one side of the platform come down another 25 feet, and kept on that way all the way down, so that if anything fell, instead of falling from the top to the bottom it would not fall any further than one of these platforms, so that the holes would not be straight under each other; would have to go from one side to the other to go any further down the shaft."

The witness also says that after leaving the 450-foot level in this mine, it was one continuous ladder-way without platforms to the bottom, a distance of 95 feet.

Witness Shirley, a miner of thirty years experience in fifty different mines, says: "The ladder platforms are 25 or 30 feet apart. If a man should fall they would catch him, and if he wanted to rest on one he could go stand up and rest, or sit on one, or lie on one. The main purpose of the platform is to catch him. One caught me one time."

A bare recital of the evidence is sufficient to show that the platforms are safety devices and resting-places of the greatest importance, and, in our opinion, to omit them for a space of 95 feet from the bottom of the mine was gross negligence.

But the learned counsel for defendant contends that the absence of the platforms was not the proximate cause of intestate's death. The cause of the death was being hurled from the ladder 100 feet to the ground. If the safety platform had been constructed it would probably have saved intestate's life. At least, that is a reasonable inference the jury were at liberty to draw. As the experienced miner, Shirley, testifies, the main purpose of the platform is to catch a falling miner. "One caught me once."

The entire controversy was presented to the jury in a very clear, full and impartial charge, of which the defendant has no reason to complain. If he had done his duty—procured the lumber and constructed the platforms on the lower part of the ladder, as he had all the way above—a valuable life would in all probability have been saved.

No error.

ISAAC SMITH v. B. P. PARKS.

(Filed 13 November, 1918.)

Estates—Defeasible Fee—Heirs of the Body—Statutes—Deeds and Conveyances.

The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee-simple title, under our statute (Revisal, sec. 1578), does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her.

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1918, of WAYNE.

This is a controversy without action.

The facts are as follows: Moses Crow died in 1883, leaving a last will and testament, devising to his daughter, Aby Smith, in fee simple, two tracts of land, embracing the 70¼ acres which is the subject-matter of this controversy. This will was written in 1880. In 1890 a deed dated 27 March, 1875, was proven and recorded, whereby Moses Crow purported to convey the same land to Aby Smith, and it is because of this deed appearing on record that this controversy has arisen. In 1912 the plaintiff acquired title to 70¼ acres, conveyed to him by his mother, Aby Smith, for a valuable consideration, and recently the plaintiff and defendant have entered into a contract, whereby the defendant has agreed to purchase said land for $5,000, but has refused to accept the deed tendered by the plaintiff, on account of the uncertainty as to the quality of the estate the plaintiff can convey.

The *habendum* in the deed of 1875 is as follows:

"For and during the term of the natural life of the said party of the second part, as aforesaid, and at her decease, I give and bequeath to the surviving heirs of her body, if any, all of the above mentioned and described premises; but should she die without leaving such heir or heirs, then the same is to revert back to her nearest kin, according to law."

The plaintiff contended that said deed conveyed a fee-simple absolute, and the defendant that it conveyed a life estate, or at most a defeasible fee.

His Honor held that the deed did not convey a fee-simple, and rendered judgment accordingly, and the plaintiff excepted and appealed.

Langston, Allen & Taylor for plaintiff.
Teague & Dees for defendant.

ALLEN, J. It is clear that the deed in question would have conveyed a fee-simple absolute, under the authority of *Price v. Griffin*, 150 N. C.,

523, if nothing appeared after the words, "surviving heirs of her body," which, under the statute abolishing estates in tail and converting them to estates in fee (Rev., sec. 1578), means the same as "surviving heirs"; but the decision in *Williams v. Blizzard,* at this term, construing language in a deed equally favorable to the contention of the plaintiff, makes it imperative to hold that the concluding words, "if any, all of the above mentioned and described premises; but should she die without leaving such heir or heirs, then the same is to revert back to her nearest kin, according to law," reduces the absolute estate to one that is defeasible.

The language in the *Price case,* which was held to convey a fee, was, "during the term of his lifetime, and at his death to his surviving heirs"; and in the *Williams case,* which rendered the fee defeasible, following the words David Williams and his lawful heirs, "children, if any; if not, to his brothers and sisters, respectively."

These authorities are conclusive against the position of the plaintiffs; but as the estate conveyed is a defeasible fee, a conveyance by the present owner will pass the complete title to the purchaser, provided Aby Smith leaves children living at her death, under *Whitfield v. Garris.* 131 N. C., 148; *S. c.,* 134 N. C., 24.

Affirmed.

MOON-TAYLOR COMPANY v. GRAY-SMITH MILLING COMPANY AND FIRST NATIONAL BANK OF CLEVELAND.

(Filed 13 November, 1918.)

1. **Bills and Notes — Negotiable Instruments — Intervenor — Due Course — Burden of Proof.**

   The burden of proof is on the intervenor, claiming in attachment proceedings to be the owner by endorsement of a draft, the subject of the litigation, in due course, to show by the preponderance of the evidence that he was the purchaser of the draft without notice of any infirmity, etc.; and when the endorsement has been admitted, but the ownership in due course has been denied, the question is one of fact for the determination of the jury.

2. **Bills and Notes — Negotiable Instruments — Banks and Banking—Intervenor—Due Course—Evidence—Trials.**

   The intervenor bank claimed to be the owner of a draft, the subject of attachment proceedings, in due course, and the evidence tended to show that the maker had an active account at intervenor's correspondent bank, where the draft was deposited, which sent it, with other items for collection, to the intervenor bank; the words, "collection number," etc., appearing upon the draft in question, and that the intervenor had received this draft under a general agreement to charge its correspondent with interest

until paid: *Held*, sufficient to take the case to the jury upon the question of whether the intervenor took the draft as a purchaser or for collection.

3. Dismissal and Nonsuit—Motions—Evidence.

A motion to dismiss an action for insufficient evidence comes too late after verdict.

4. Courts—Discretion—Verdict—Appeal and Error.

The refusal of the trial judge to set aside a verdict as contrary to the weight of the evidence is within his just discretion and not appealable in the absence of its abuse.

APPEAL by intervenor from *Adams, J.*, at May Term, 1918, of GUILFORD.

This is an action brought by Moon-Taylor Company, a corporation, with its principal office in Greensboro, against Gray-Smith Milling Company, a corporation, with its principal office in Wooster, State of Ohio.

The milling company shipped a car-load of wheat to W. A. Watson & Co., of Greensboro, with sight draft attached to bill of lading, order notify A. G. Smith. Watson & Co. paid the draft, and the plaintiff attached the proceeds, the sum of $1,120.20, the plaintiff claiming that the milling company was indebted to it in the sum of $177.50 for breach of contract for commissions and for damages arising by reason of the shipment of wheat inferior in quality to that ordered. The First National Bank of Cleveland, Ohio, intervened and claimed the proceeds of the draft with bill of lading attached.

The draft was introduced in evidence and had on its face "Collection No. 1876." It was endorsed by the milling company to the Citizens National Bank of Wooster, Ohio, and this bank endorsed it to the intervenor.

The deposition of William Harris was also introduced, and is in part as follows:

"I am cashier of the Citizens National Bank of Wooster, Ohio. The Gray-Smith Milling Company had a checking account with our bank, and on 10 December, 1915, deposited the sum of $1,112.20. It was a bill of lading and draft on W. A. Watson & Co., of Greensboro, N. C., I think. Gray-Smith Milling Company was the maker of the draft. It was drawn on W. A. Watson & Co. and was payable to the Citizens National Bank at Wooster, Ohio. The draft was dated 10 December, 1915. A bill of lading was attached to the draft. It was dated 7 December, 1915, issued by the Pennsylvania Company and signed by J. R. Shenk, agent. It was issued Leaksville, Ohio. The goods were shipped to the order of Gray-Smith Milling Company, Greensboro, N. C. I sent a draft and the bill of lading to the First National Bank of Cleveland. Before sending them I gave the Gray-Smith Milling Company credit upon their account. We accepted the draft and bill of lading in the

regular course of business, and credited it to the Gray-Smith Milling Company. The balance of the Gray-Smith Milling Company on 11 December, 1915, was $1,986.45; on 13 December, 1915, it was $1,309.39; and on 14 December, 1915, their account was overdrawn $965.74, and on the 16th they were overdrawn $2,776.76."

Q. "You have stated that you sent this draft and bill of lading to the First National Bank of Cleveland. Had any arrangement been previously made by which you could send such drafts and bills of lading to that bank?" A. "Yes."

Q. "How was that arrangement made?" A. "I wrote to the bank, asking them whether or not an arrangement of any kind could be made, as we understood it was being done at some other places. I received a letter from them, saying they would be glad to do that."

"Exhibit C is my letter to H. R. Sanborn, assistant cashier of the First National Bank of Cleveland. Exhibit D is the reply of H. R. Sanborn to my letter."

At this point counsel for intervenor read to the jury Exhibit C and Exhibit D.

"In December, 1915, an account existed between the Citizens National Bank of Wooster and the First National Bank of Cleveland. The volume of business done between the two banks was about $8,000 to $10,000 a day. I think our minimum balance with the First National Bank was about $10,000 a day.

"We accepted this draft on the credit of the bill of lading attached to the draft. This deposit slip of 10 December, 1915, shows other items. The other items were checks. All these items were sent on their proper course for collection."

Q. "In the letter which is marked Exhibit D, I observe, it says that your bank is to be charged with interest at the rate of 5 per cent during the period that the drafts are outstanding." A. "Yes, sir."

The letters referred to are not in the record.

The deposition of the assistant cashier of the intervenor was on file, but was not in evidence.

The issue submitted, and the answer thereto, are as follows:

"Is the First National Bank of Cleveland, Ohio, the intervenor, the owner of the proceeds of the draft attached in this cause and entitled to the possession of same?" Answer: "No."

The intervenor, the First National Bank of Cleveland, claimed to be the holder of the draft in due course. This was denied by the plaintiff, who alleged and contended that the intervenor was not a holder in due course, but only an agent for collecting the draft, and that the intervenor took the draft with knowledge of its infirmity and in fraud of the plain-

tiff's right. This was the theory upon which the case was tried and argued to the jury.

The plaintiff made no point as to the endorsement of the draft, and the court charged the jury that the endorsement was admitted, but the court was of opinion that upon the evidence introduced there was sufficient evidence to be considered by the jury on the question of the alleged fraud or knowledge on the part of the intervenor, *i. e.*, whether the intervenor was a *bona fide* holder in due course, or whether it took the draft with knowledge of the plaintiff's claim or as a collecting agent. Among other things, the court charged the jury as follows:

"The burden of this issue is upon the intervenor to show by the greater weight of the evidence that it is the owner of the proceeds of the attached draft. (If you find by the greater weight of the evidence that the intervenor is the owner of the proceeds of the draft attached in his case, you will answer the issue 'Yes.' If you do not so find, you will answer it 'No.'")

The intervenor excepted to the last preceding paragraph which is in parentheses.

The court charged the jury at length, presenting the evidence and the contentions as to whether the intervenor was a holder of the draft in due course, a purchaser, or merely a collecting agent.

There was no other exception in the charge.

The intervenor moved to set aside the verdict as against the weight of the evidence. The court, in the exercise of its discretion, denied the motion.

The intervenor moved to set aside the verdict and for judgment, notwithstanding the verdict, on the ground that upon the admission of the endorsement of the draft, and upon the undisputed evidence in the case, there was nothing to be submitted to the jury and the intervenor was entitled to judgment. Motion overruled. Intervenor excepted.

There was judgment for plaintiff. The intervenor excepted and appealed.

Brooks, Sapp & Kelly for appellee.
Jerome & Scales for appellant.

ALLEN, J. The burden was on the intervenor to show title to the property attached (*Mfg. Co. v. Tierny*, 133 N. C., 631), and consequently his Honor could not do otherwise than charge the jury that it must establish the fact by the greater weight of the evidence, which he did in the part of the charge excepted to.

Nor was the intervenor entitled to judgment, notwithstanding the verdict.

The only admission made by the plaintiff was as to the endorsement; and the credibility of the other evidence tending to prove that the intervenor was the holder, in due course, of the draft, if uncontradicted, was for the jury and had to be submitted to them.

In other words, the burden was on the intervenor to prove that it was a purchaser, for value, of the draft, without notice of any infirmity, which is denied, not admitted by the plaintiff, and it moves for judgment upon the single admission of the endorsement of the draft by the Bank of Wooster, which is as consistent with sending the draft for collection as a sale, and particularly so when there is written on the face of the draft "Collection No. 1876."

Again, the objection that there is no evidence to sustain the contention of the plaintiff that the intervenor was a mere collection agent comes too late after verdict. *S. v. Leak,* 156 N. C., 646; *S. v. Harris,* 120 N. C., 578, and cases cited, criminal and civil. If, however, the point had been made in apt time it could not have been sustained.

The draft had on its face "Collection No. 1876." The cashier of the Wooster Bank testified: "We accepted this draft on the credit of the bill of lading attached to the draft. This deposit slip of 10 December, 1915, shows other items. The other items were checks. We sent all these items on their proper course for collection." This was sufficient without other evidence to take the question to the jury as to whether the intervenor bank, to which the Wooster Bank sent the draft, received it for collection or as a purchaser.

It also appears that by agreement between the two banks the intervenor charged interest against the Wooster Bank, which is inconsistent with a purchase and the ownership of the draft. If the draft was bought and paid for as the intervenor contends, why should there be an interest charge either way?

We find no reason for disturbing the verdict and judgment.

No error.

MRS. ELIZABETH ROLLINS v. CITY OF WINSTON-SALEM.

(Filed 13 November, 1918.)

1. Municipal Corporations—Cities and Towns—Negligence—Street Lights—Hydrants—Discretion.

While it is the duty of the authorities of an incorporated town to keep its streets and sidewalks in a reasonably safe condition, the placing of street lights and water hydrants are matters left largely to their discretion, and in the absence of its oppression and abuse, no liability attaches for a personal injury thereby caused to a pedestrian.

2. Municipal Corporations—Cities and Towns—Negligence—Shade Trees.

Trees along the sidewalk in a town are for a useful purpose and not inconsistent with the object for which streets are made and maintained; and where ample room is left to answer the demands of travel, the city will not be held liable in damages solely because the shadow of a tree cast by an electric street light on a hydrant near the curbing of the sidewalk prevented a pedestrian seeing the hydrant.

3. Same—Electric Lights—Shadows—Hydrants—Duty of Pedestrians—Evidence—Nonsuit—Trials.

Pedestrians upon the sidewalk of a city are required to observe care in looking out for hydrants properly placed near the curbing of the sidewalk, and damages may not be recovered of the town for injuries received from stumbling over one of them so placed within the shadow of a tree cast by an electric street light, in the absence of other evidence tending to show negligence therein on the part of the authorities of the town.

APPEAL by plaintiff from *Lane, J.*, at the September Term, 1918, of FORSYTH.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant.

On the night of 7 October, 1917, the plaintiff, while walking on the sidewalk on the right-hand side of Liberty Street, going north, stumbled over a fire hydrant, injuring her left arm. The hydrant was about 26 inches high and was within 7 inches of the outside curb, the hydrant itself being 8½ inches thick, making the side of the hydrant farthest from the outside of the curb 15½ inches. This hydrant was located in a block between Patterson Avenue on the south and White Street on the north. At Patterson Avenue, which was 316 feet from the hydrant, there was a high-power electric street light and at White Street, which was 468 feet from the hydrant, there is such light. The sidewalk at this point is some seven or eight feet wide and is paved from property line to curb with concrete. In other parts of the city the sidewalk is not paved to the curb.

The plaintiff introduced evidence tending to show that on account of the presence of a tree near this hydrant and the distance from the street lights, it was so dark that a person walking along the sidewalk could not see it. Some fifteen or twenty feet away from the hydrant, both north and south of it, was located a telephone or electric light pole about the same distance from the curb as the hydrant. The evidence disclosed that this hydrant, like other hydrants in this city, was placed in the edge of the sidewalk next to the curb and just far enough from the curb so that the part of the hydrant to which the hose was to be attached would clear the driveway.

At the conclusion of the evidence there was a judgment of nonsuit, and the plaintiff excepted and appealed.

Fred M. Parrish for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J. It is the duty of the municipal corporation to maintain its streets and sidewalks in a reasonably safe condition, and a failure to do so is negligence, which subjects the corporation to liability for injuries proximately resulting therefrom. *Sehorn v. Charlotte,* 171 N. C., 541.

In the performance of this duty, wide discretion is given to the governing authorities, and the courts are loath to interfere with its exercise, and will usually decline to do so unless it is grossly abused or is oppressive. *Small v. Edenton,* 146 N. C., 529; *Rosenthal v. Goldsboro,* 149 N. C., 135.

It is not an absolute duty imposed on the corporation to light its streets, and when it does so the placing of the lights is left largely to its discretion (*White v. New Bern,* 146 N. C., 447), and the same rule prevails as to the location of the hydrants for fire protection when placed near the curb.

"Grass plots are ornaments and shade trees along the sidewalk give protection from the heat in summer. While they may be obstructions, yet when ample width is left to answer the demands of travel, they are such obstructions as serve a useful purpose and are not inconsistent with the object for which streets are made and maintained. Like a fence, a hydrant, a hitching post, telegraph or telephone poles, they are lawful obstructions." *Teague v. Bloomington,* 40 Ind. App., 68.

"While it is the duty of a municipal corporation to use reasonable care to keep its streets in a safe condition to drive upon, it has the right to devote the sides of the streets to other useful public purposes, provided it leaves an unobstructed driveway of ample width for the passage of teams. It may construct sidewalks of a higher grade and gutters of a lower grade than the driveway, place curbing on the line of the gutters, erect hydrants and authorize the erection of hitching posts and stepping stones as well as poles to support the wires of telegraph and telephone lines; it may lay out grass plots on the sides of the streets, set out trees therein, and protect both grass and trees from injury by fences or other reasonable means. . . . In the case before us, a large stone took the place of curbing in order to keep people from driving over the grass and against the trees. While it was an obstruction, it was a lawful obstruction, the same as a fence, hydrant, or telegraph pole." *Daugherty v. Horseheads,* 159 N. Y., 154.

Persons using the sidewalks are required to take notice of these conditions and of the uses to which the sidewalks may legitimately be put. They "must take notice of such structure as the necessities of com-

merce or the convenient occupations of dwelling-houses" require. *Russell v. Monroe,* 116 N. C., 727.

Applying these principles, there is no ground upon which the defendant can be held liable, as there is no evidence of an abuse of discretion in the location of the lights or hydrant, and the injury to the plaintiff was caused, as she says, because she went too close to the hydrant at the curb, where she might reasonably expect an obstruction of this character.

As said in *Herman v. Philadelphia,* 194 Pa., 542, a case which covers all phases of this appeal: "As fire plugs are a clear public necessity, and cannot be placed in the open highway, and as they must be placed in such a position as to be easily accessible in case of fire, there is no other position for them but on the sidewalks, and it is the universal practice to locate them there. The municipality is the sole authority to determine this matter, and, of course, as we have frequently held, their discretion is not to be held subject to the verdict of juries. The city is under no legal obligation to light its streets and cannot be held responsible for an alleged insufficiency of light."

We are of opinion the judgment of nonsuit was properly entered.

Affirmed.

BIVENS BROS. v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 13 November, 1918.)

1. **Carriers, Freight — Railroads — Perishable Freight — Negligence—Contracts—Cold Damage.**

   A carrier of interstate freight may not contract against the result of its own negligence, under the Cummins Amendment, United States Compiled Statutes, par. 8604a; and its defense that a shipment of sweet potatoes was received at the owner's risk of freezing will not relieve the carrier from the payment of damages so caused.

2. **Same—Transportation—Unreasonable Delay—Freezing—Actus Dei.**

   Where a shipment of sweet potatoes is suddenly caught in cold weather by reason of the carrier's negligent delay in transporting them, and frozen and rendered worthless in consequence, it is the carrier's negligence that has caused the damage, and not *actus dei.*

3. **Carriers of Freight—Railroads—Perishable Freight—Care in Shipment—Burden of Proof.**

   It is the carrier's duty to load perishable goods in proper cars, and to take reasonable care for their preservation and delivery in time to prevent loss; and in an action to recover damages for a loss thereto, arising from an unreasonable delay in transportation, the burden is on the carrier to show it exercised such care.

4. Commerce—Transportation—Carriers—Penalty—Statutes.

A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation, under our statute (Revisal, 2632.).

APPEAL by defendant from *Harding, J.*, at May Term, 1918, of UNION.

This action was begun before a justice of the peace. The plaintiff recovered $21.15 for the negligent delay to transport and deliver a shipment of potatoes, by reason of which the potatoes were frozen and rendered worthless. The Seaboard road, which received the potatoes at Wadesboro on 5 February, delivered them the next day at Monroe, but it was in evidence that they were already frozen when the latter road received them, and hence a nonsuit was entered as to that road.

On appeal, the verdict and judgment were for the same amount. Appeal by defendant.

Stack & Parker for plaintiffs.
Redwine & Sikes for defendant.

CLARK, C. J. On 30 January, 1917, R. E. L. Brown delivered to the defendant seventeen bags of sweet potatoes of the value of $21.15 for shipment to plaintiffs via Florence and Wadesboro. They arrived at Monroe on 6 February in a frozen and worthless condition. There is no conflict in the evidence. The potatoes were delivered at Chadbourn, 10 a. m., 30 January, in first-class condition and were loaded promptly. They were delivered by the defendant to S. A. L. R. R. at Wadesboro, N. C., on 5 February. It is only 121 miles from Chadbourn to Wadesboro via Florence. It is not in evidence that Florence was a transfer point or that the potatoes were transferred there. The defendant owned the line from Chadbourn, via Florence, to Wadesboro. The weather was normal up to the night of 3 February, when there was a sudden drop in temperature, whereby the potatoes were frozen and rendered worthless. The letters "O. R. F." were written across the face of the bill of lading, and one witness testified these letters meant "Owner's risk of freezing," but there was no evidence that the shipper was given any reduction in rate on account of this provision being inserted. Besides, if the damage was caused by the defendant's negligence, it could not stipulate against its liability therefor, since the Cummins Amendment, which is but a recognition of the formerly universally recognized law (till some late decisions) that a common carrier cannot stipulate against liabilities for damages caused by its own negligence.

In the evidence, there is no explanation of the unreasonable delay of seven days in transporting the potatoes 121 miles from Chadbourn to Wadesboro, nor evidence of any care by the defendant to protect the

potatoes from the freezing cold. In view of the perishable nature of this freight, it should have been delivered at Wadesboro (121 miles) long before the freeze on the night of 3 February.

This is not an action for a penalty. But even if it had been, this is an interstate shipment, to which the penalty prescribed by Revisal, 2632, does not apply. *Marble Co. v. R. R.*, 147 N. C., 53. There was no delay at Chadbourn, where they were loaded promptly. And the jury were certainly justified in finding that they should have been delivered to the Seaboard at Wadesboro, 121 miles away, by 2 February, which would have been seventy-two hours to traverse 121 miles. If delivered that day to the Seaboard, they should have reached their destination at Monroe that night or next day before the freeze.

The stipulation "O. R. F." on the bill of lading could not release the company for any damages caused by its negligence. *McNeill v. R. R.*, 135 N. C., 682; *Parker v. R. R.*, 131 N. C., 827; *Ib.*, 133 N. C., 336. This rule has since been adopted by Congress, U. S. Compiled Statutes (1916), par. 8, 604a (being the Cummins Amendment, ratified 9 August, 1916, ch. 301), and restoring the common-law rule.

It was the duty of the defendant not only to transport the potatoes within a reasonable time, but also in a proper car, considering the season. *Forrester v. R. R.*, 147 N. C., 553, which was a shipment of fruit.

The burden was upon the defendant to "exculpate itself from liability for damage to goods in transit because it has the best opportunity of knowing and proving how the injury occurred." *Peele v. R. R.*, 149 N. C., 393.

In *McGraw v. R. R.*, 18 W. Va., 361, it was held: "Freezing weather cannot be deemed the act of God, and the carrier is liable unless he has been guilty of no negligence or misconduct by which loss or damage may have been occasioned. The mode of conveyance, the distance, the nature of the goods, the season of the year, and the character of the weather are all matters entering into the consideration of what was a reasonable time." In that case the potatoes were delivered to the carrier on 13 February, to be shipped the next day. The weather was mild, and so continued on the 14th. When they reached their destination, a distance of 104 miles, on the 16th they were frozen and worthless. The weather turned cold on the 15th, and the Court held that the carrier was liable.

We find no error in the charge, which correctly instructed the jury that the plaintiff must satisfy them that the negligence of the defendant was the proximate cause of the injury. The case below was tried by both sides upon the theory that the potatoes were a total loss.

The defendant excepts because the issue submitted was simply, "Is

the defendant indebted to the plaintiff; and if so, in what amount?" This issue, taken in connection with the charge, presented clearly the question whether the defendant was guilty of negligence, and if so, was it the proximate cause of the injury and the amount of the damage. The issues are sufficient if, as here, all phases of the matter in controversy can be presented. *Carr v. Alexander,* 169 N. C., 665.

No error.

SOUTHERN RAILWAY COMPANY v. J. E. LATHAM AND GREENSBORO WAREHOUSE AND STORAGE COMPANY.

(Filed 13 November, 1918.)

1. **Carriers of Goods—Freight Rates—Legal Rates—Agreements—Federal Statutes—Interstate Commerce Commission—Corporation Commission.**

The rates of transportation allowed carriers of freight are those established by the Interstate Commerce Commission, under the Federal statutes as to interstate commerce, and by the State Corporation Commission, under the State statutes as to intrastate commerce, which may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law.

2. **Same—Intermediate Points—Credit Allowances—Discrimination.**

Where, under legally established tariffs, a shipper is allowed as a credit upon the amount of full transportation charges, on a certain commodity, freight he had prepaid to a certain intermediate point, by way of an "expense bill," and to be established in a specified way, but requiring that the further transportation to destination be made before a certain date in each year, any agreement made to the contrary between the carrier and the shipper, respecting a later date than that allowed and established pursuant to the law, amounts to an unlawful discrimination, and is unenforcible. The objection that the pleadings in this case were directed solely to the agreement, and that recovery by the carrier should not therefore be allowed, is untenable.

ACTION, tried before *Adams, J.,* and a jury, at April Term, 1918, of GUILFORD.

The action is to recover by reason of freight charges on shipments of cotton made by defendants over plaintiff road in September, 1910, and, thereafter, to various points in and beyond borders of the State, the balance due on such charges alleged in the complaint amounting to $1,192.76. On denial of liability, the case was heard on the three following issues:

1. Did the plaintiff and the defendants enter into an agreement by

the terms of which the defendants were to pay to plaintiff the freight for the several shipments set out in the complaint?

2. Were the various articles set out in the complaint reshipped after 31st August following the date of the original shipments to Greensboro?

3. In what amount, if any, are the defendants indebted to the plaintiff for unpaid freight?

The first of these issues was submitted to the consideration of the jury and answered "No." The second was answered "Yes," by consent, and third not answered, the court having instructed the jury that if their answer to first issue should be "No" the third issue need not be answered.

Judgment on the verdict for defendants, and plaintiff excepted and appealed, assigning errors.

Wilson & Frazier for plaintiff.
R. D. Douglass for defendant.

HOKE, J. There seems to be no substantial difference between these parties as to the essential facts of the controversy. From the admissions in the pleadings and the facts in evidence, it appears that plaintiff railroad, a common carrier of inter and intrastate commerce, in obedience to and in accordance with the Federal and State statutes applicable and the rules and regulations of the Interstate Commerce Commission and of the Corporation Commission of North Carolina, has duly established a schedule and tariff of rates in shipments of freight into and out of Greensboro, N. C., and that the same were in force at the time of the shipments of cotton, the subject-matter of the suit; that under a provision of these tariffs, both Federal and State, according to the respective character of the shipments, there was a warehousing privilege open to defendants and other dealers in like case, by which, as shippers of cotton into Greensboro from other points, they were privileged to ship it out (when a back haul was not involved) within the life of the "expense bill" allowing the through rates from the point of origin to final destination, the shippers producing the original freight bills covering such inbound cotton to show they were entitled to the privilege of using sums originally paid in satisfaction of or payments on the amount due for the entire distance.

In reference to this privilege, another provision of the established tariffs is "That paid freight bills for cotton handled under this arrangement will not be accepted for shipment after 31st August following the date upon which they were made"; that a large amount of cotton shipped into Greensboro by defendants over plaintiff railroad prior to 31 August, 1910, was shipped out again after that date, principally in September and October following, to different points in and out of the

State, and the amount due for freight thereon, according to the established rates out of Greensboro, aggregated the sum of $1,200 and over; that the duplicate bills of lading on these reshipments produced at the trial contained words "order notify" and "freight prepaid," and the oral evidence in reference to the meaning of this last entry was that it signified that shippers were to prepay the freight in protection of the ultimate consignee; that defendants, on these shipments, had paid only a small amount in money, not as much as $20, and had undertaken to settle the amount due on the basis of a through rate charge from the original point of shipment to the final destination and to satisfy the sum so estimated by means of these "expense bills"—that is, the amount of freight paid on the original shipments into Greensboro—and this when, according to the provisions of the tariff applicable, the time of the "privilege" had expired and these shipments were no longer available for the purpose.

From these the facts chiefly relevant, admitted or not seriously controverted, it is clear that defendants are responsible for the amount properly due for these shipments, both as consignors under the bill of lading presented and under the express agreement that they were to prepay the freight in protection of the designated consignee, and, further, that this amount must be determined by the rates of the schedules and tariff established, pursuant to law. *Tex. Pac. Ry. v. Mugg & Dryden,* 202 U. S., 242; *Central of Ga. Ry. v. Birmingham Sand and Brick Co.,* 9 Ala. App., 419; *Baltimore, etc., Ry. v. New Albany, etc., Basket Co.,* 48 Ind. App., 647; *Holt v. Westcott,* 43 Me., 445; *Ashboro Wheelbarrow Co. v. Ry.,* 149 N. C., 261.

In *Ry. v. Mugg, supra,* in the 50 Lawyers' Ed., U. S. Sup. Ct. Rep., 1011, the syllabus of the decision is given as follows: "A common carrier may exact the regular rates for an interstate shipment as shown by its printed and published schedule on file with the Interstate Commerce Commission and posted, etc., as required by the Interstate Commerce Act, although a lower rate was quoted by the carrier to the shipper who shipped under the lower rate so quoted."

In the case from Indiana Court of Appeals, *supra,* it was held, among other things:

"(1) That one who engages a railroad company to transport freight in interstate commerce is liable for the established rate on such freight regardless of any contract the shipper may have with the consignee.

"(4) A shipper must take notice of the rates for interstate shipments, and he relies at his peril on the statements of the carrier's agents.

"(5) An interstate carrier is not estopped from recovering the balance due for a shipment by the unauthorized act of its agent in quoting an illegal freight rate."

In *Central of Ga. Ry. v. Birmingham Sand and Brick Co., supra,* the principles applicable are given as follows:

"(1) A carrier may look either to the consignor, with whom the contract of shipment is made, or to the consignee for the freight.

"(3) Under the Interstate Commerce Act, the freight rate of an interstate shipment is not that named in the bill of lading or contract of shipment, but the lawful rate existing at the time, whether or not such rate is known to the consignor or the consignee, and regardless of whether the parties were misled by the carrier as to the lawful rate or whether it had posted the lawful rate as required by the statute; hence the carrier cannot by any act estop itself from demanding the lawful rate."

And in 43 Me., *supra:* "In all cases where goods are shipped by a consignor under a contract or for his benefit, he is originally liable for the freight."

These being the correct and controlling positions on the subject, recognized both in Federal and State decisions, there was error to plaintiff's prejudice in making the rights of the parties to depend on an answer to the first issue in defendant's favor, that issue referring to the amount due for freight by the agreement had between them, and the jury having answered the second issue "Yes," thereby determining that the time of the interfering privilege had expired, the freight due and collectible for these shipments is that fixed by the law and may not be changed or modified by agreement between the shipper and the carrier's agent.

It is urged for defendants that this position is not open to plaintiffs for the reason that in his pleadings he has based his right to recover on an express agreement to pay a stated amount of freight, and this issue having been found against plaintiff it is precluded from insisting on any other or further recovery; but this view is entirely too restricted, and, without going into a full statement of the pleadings, we are all of opinion that the allegations of the complaint are fully broad enough to cover this phase of plaintiff's demand and are designed and well framed for the purpose.

It is coming to be more and more recognized that, with a minimum of official interference, a government is required at times to establish regulations to afford its citizens equal opportunity in their industrial and commercial life -a requirement that is nowhere more imperative than in preventing discrimination among shippers of freight with our public service companies. These statutes enacted for this purpose and the rules and regulations thereunder designed to effect as far as possible an equal charge for like service among all shippers, permit no deviation by agreement or attempted adjustment of the parties. Not only so, but

the companies, as stated by his Honor, are directed and enjoined to exhaust all legal remedies in enforcement of the established rates.

On the record and facts in evidence, as they now appear, we are of opinion that plaintiff is entitled to recover the balance due for these shipments on the basis of freight charges established pursuant to law, and this will be certified that the amount may be ascertained and determined in response to the third issue.

New trial.

MARTHA F. RIDGE, ADMX., v. CITY OF HIGH POINT AND THE TATE FURNITURE COMPANY.

(Filed 13 November, 1918.)

1. **Negligence — Master and Servant — Joint Tort Feasors — Evidence—Instructions—Cities and Towns—Ordinances—Implied Notice.**

Where the evidence tends to show that the plaintiff's intestate was killed in the performance of his duties as conductor on a train, by being struck by lumber, piled at a street crossing close to the track by a furniture company, in violation of a city ordinance, in an action against the lumber company and the city: *Held*, sufficient to establish the liability of both defendants as joint tort feasors; and the court having properly instructed the jury upon the questions of proximate cause and primary and secondary liability as between the defendants, their verdict is sustained on appeal.

2. **Negligence—City Ordinances, Violation—Proximate Cause.**

The violation of a city ordinance which produces an injury, while negligence *per se*, may only become actionable when the proximate cause thereof.

3. **Negligence—Contributory Negligence—Evidence—Questions for Jury.**

Where there is evidence tending to show that the plaintiff's intestate, a conductor on a freight train, was killed through the joint negligence of a furniture company and an incorporated town, by being struck by a pile of lumber left too near the track, while he was attending to his duties, at dark, standing on the step of the car; that he had remarked the day before upon the lumber being dangerously near the track, though the motor car had passed the place safely just before he was killed, and that he did not avail himself of a safe place, reached by ladders, on the top of the car, provided for him to perform the character of work he was engaged in when killed: *Held*, that the credibility of witnesses and other matters were for the jury to determine, upon the question whether he acted under the circumstances as a man of ordinary prudence would have done; and his alleged contributory negligence in not availing himself of a safe place provided by his employer was not, under the particular circumstances shown, one of law to be decided by the court.

ACTION, tried before *Adams, J.*, and a jury, at March Term, 1918, of GUILFORD.

Plaintiff seeks to recover damages for the death of her husband, Albert L. Ridge, which she alleges was caused by the negligence of the two defendants. There was another defendant, the N. C. Public Service Company, but a nonsuit was entered as to it.

The allegation of negligence is that the Tate Furniture Company piled lumber in Perry Street so near the track of the railroad company as to make it dangerous to passing cars and those operating them, and that this was also forbidden by an ordinance of the city of High Point, and that its codefendant permitted the lumber to be so piled, whereas it was required by its charter to keep its streets clear of obstructions and to see that they were properly lighted.

There is no serious contention that the lumber was piled in the street and in close proximity to the tracks of the railroad company, and there was evidence tending to show that the plaintiff's intestate, who was the conductor of one of the trains then using the track, was knocked from his position on the side ladder by the lumber and killed. Early in the morning of 1 June, 1917, while it was yet dark, the motorman, the intestate being in the cab with him, drove the engine from the Tate furniture factory to the High Point furniture factory, which was a short distance north of the Tate factory, to get a box car which had been placed there several days before. The motorman testified that he had "no trouble" in passing the lumber that morning. The car was coupled to the engine, in front of it, so that it was pushed back along Perry Street to Green Street. The intestate, who was the conductor, got upon the step near the front of the box car, on the left side of it, and on the same side of the track where the lumber was piled. There was a handhold there for him to use. He took this position to attend to the switch and give necessary signals. It was his duty to take care of the front of the train. The motorman could not see Ridge from his cab except once, and that was when they were turning the curve near the High Point factory yard, but when the car straightened out he was not in the motorman's line of vision. The next time the motorman saw him he was lying on the ground near the lumber, and was dying. The motorman stopped the train and went to his assistance, but he died soon after he reached him.

As they went from Greene Street a few days before (28th or 29th May) to the High Point factory, in order to take the car there and leave it, the car was behind the engine, and when the engine cleared the lumber pile the motorman noticed that the car dragged some of the planks from the pile of lumber, and Ridge, who was with him in the cab, "said something about the closeness of the lumber; that it was

dangerous, and some one was going to be hurt, or something to that effect."

There was evidence that there was sufficient light to see the outline of the pile of lumber as they approached it on their return, and the motorman testified that as they went to the High Point factory that night for the car they did not hit the pile of lumber, but it remained intact. There also was evidence that other lumber had been piled at or about the same place after they had carried the car to the High Point factory. There was an iron step-ladder at the other end of the car from where the intestate was standing and next to the motor engine, and it extended to the top of the car. There was a step-ladder to the top of the car on the side next to the Tate furniture factory, and a witness stated that had he used this ladder or stood on the top of the car his position would have been safe, as he knew of nothing on that side, and that he could have given signals from the top of the car, which could have been reached by the ladder. The two side ladders were "diagonally opposite," and they and the steps and grab-irons at the other ends were in good condition.

There was other evidence bearing more or less upon the issues, but we have given substantially all that we deem necessary to an understanding of the real questions involved, and have endeavored to state it most favorably for the defendants.

The jury found by their verdict that defendants were each guilty of negligence which approximately caused the death of plaintiff's intestate; that he was not guilty of contributory negligence, and then assessed the damages. Judgment and appeal.

Clifford Frazier and John A. Barringer for plaintiff.
King & Kimball for defendant Tate Furniture Company.
Peacock & Dalton for defendant City of High Point.

WALKER, J., after stating the case: The defendant Tate Furniture Company asked for certain special instructions, and the court, we think, gave these which were correct, or such parts of them as were proper, in the general charge to the jury. We cannot see why, in any phase of the evidence, the defendants were not jointly liable to the plaintiff for the death of her intestate, which was plainly caused by their united and wrongful act. We cannot understand why this case, upon its uncontroverted facts or upon the evidence, which, in this respect, bears all one way, is not brought thereby within the principles stated and applied by us in *Gregg v. City of Wilmington and James F. Wool,* 155 N. C., 18. As to the Tate Furniture Company, there is the additional fact, which was not in the *Gregg case*, that it was directly and intentionally

violating an ordinance of the city of High Point when it piled the lumber in the street, and thereby obstructed it and rendered it exceedingly dangerous to persons on trains which passed that point. In any view of the facts, whether by reason of the violation of the ordinance or by the act itself of piling the lumber in such close proximity to the railroad track, that company was negligent, and there can be no doubt of the correctness of the verdict, which finds that this act of negligence caused the death of the intestate. Upon the evidence, this proposition is is hardly arguable. The city is also liable because, as the jury properly found, it had notice, or should in the exercise of due care have had notice, that this lumber had been carelessly piled in the street so as to become an obstruction to those entitled to use it and a menace to those operating the trains on the railroad track. It was a public nuisance as defined and understood by the law. But the court left the question of negligence to the jury for them to find the facts, with proper instructions as to the law of negligence. It would, upon the facts, which cannot be seriously denied, appear that there was negligence on the part of both defendants which was the proximate cause of the death, not considering now the contributory negligence of the intestate, if there was any. There was a clear violation of the ordinance when the lumber was piled in Perry Street, and this was negligence *per se*, or, in other words, it was negligence, as matter of law, to be declared by the court, but it was not actionable negligence as it may have resulted in no actual harm. In order to make it actionable, it was necessary to show that it was the proximate cause of the death, as the two must unite so as to become actionable. This is fully explained in *Ledbetter v. English*, 166 N. C., 125; *McNeill v. R. R. Co.*, 167 N. C., 390; *Paul v. R. R. Co.*, 170 N. C., 230.

It was said by *Justice Allen* in the *Paul Case:* "It is established by the evidence that the defendant blocked a public crossing in the town of Parkton with a train of cars in violation of the ordinance of the town, and this is negligence; but a plaintiff cannot recover upon proof of negligence alone. He must go further and show that the negligence complained of is the proximate cause of his injury."

And in *Rich v. Electric Co.*, 152 N. C., 694, by *Justice Manning:* "It seems to us that the principle is clearly settled by this Court in the cases cited that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate—that the injury was the proximate cause; and this requirement is fundamental in the law of negligence."

The Court said in *Ledbetter v. English, supra*, at p. 130: "When it is remembered that negligence is the failure to perform a duty imposed

by law, it necessarily follows that the failure, without legal excuse, to obey the provisions of a statute or ordinance imposing a public duty is negligence, and not merely evidence of negligence, and that when this is proven, the plaintiff has furnished some evidence of a right to recover, which can, however, avail him nothing unless he goes further and proves that this failure of duty was the real or proximate cause of his injury."

It may be stated another way: When the violation of a statute or ordinance is shown, it is negligence in itself, but is not actionable until damage appears as its proximate effect, so that a causal relation between them is established. *Brewster v. Elizabeth City,* 137 N. C., 392; *Crenshaw v. R. R. Co.,* 144 N. C., 314; *Hanes v. Shapiro,* 168 N. C., 24, and *McAtee v. Mfg. Co.,* 166 N. C., 457, where it is said: "It is true that no cause of action can arise by reason of a negligent default unless there is continuous and natural sequence and which a person of ordinary prudence could foresee would naturally and probably ensue."

The Court said in the *Crenshaw case, supra:* "The burden is always on the plaintiff to show by a preponderance of the evidence that the defendant committed a negligent act, and that it was the proximate cause of the injury. The two facts must coexist and be established by the clear weight of the evidence before a case of actionable negligence is made out." But the negligence of the defendants is so apparent that it is scarcely required that we should prolong the discussion. The court correctly charged as to the element of proximate cause, defining and explaining it to the jury with sufficient precision.

As to the intestate's contributory negligence: We are unable to say, upon the evidence and as matter of law, that contributory negligence was conclusively shown, for there are permissible views of the evidence which make it a matter for the jury. The question, at last, is whether the intestate acted as a man of ordinary prudence would have done in the same circumstances, considering that he was, at the time of his death, engaged in operating the train and intent upon the performance of his duties. When the motor engine passed the lumber pile the same morning there was no difficulty in passing it safely, and between 28th May and 1st June of that year another pile of lumber had been placed by the side of the track. Whether the plaintiff selected the better method of performing his work was also a question for the jury, and the learned judge submitted all the essential questions of fact to them with proper explanation of the law.

If he had withdrawn the question from the jury and decided it himself as matter of law, and directed them to answer the third issue "Yes," it would have been error, as, for one reason—and there are others equally strong—he would have taken from the consideration of the jury the question as to the credibility of the witnesses. For illustration: it was

for them to say whether they believed the motorman when he stated what the intestate said in regard to the dangerous character of the pile of lumber, and whether at the time he was killed the intestate knew of the danger; and it was also necessary for the jury to decide whether the intestate exercised due care and prudence in the manner of doing his work. It is true, generally speaking, that when two methods are presented for doing a thing, the one safe and the other dangerous, the servant should, in the exercise of ordinary care, adopt the safer course; but in its application, this rule, like all others, will be found to depend upon the particular facts of the case, which the jury must find.

It would be useless to consider the case more extensively or more in detail. The charge of the court was full, and the presiding judge carefully stated the contentions and explained all the rules of law applicable to the facts as the jury might find them to be. It did not fall short of a strict observance of the statute in any respect, and gave the defendants the full benefit of all the instructions to which they were entitled. The question involved was free from any difficulty in law, and the just result depended very largely upon how the jury should find the facts to be. The charge was certainly not unfavorable to the defendants.

Whether the city of High Point has properly brought its appeal to this Court or not makes little practical difference, as we hold that, if it has, there was no error as to either defendant. The question as to primary and secondary liability was properly submitted to the jury, and we think that, in law and in fact, they have returned a correct verdict upon that question.

We have reviewed and examined the record with great care and scrutiny and can discover no error therein.

No error.

ATLAS POWDER COMPANY v. JAMES DENTON AND OTHERS, TRADING AS DENTON BROS. & CAGLE, AND AS DENTON BROS.; CALLAHAN CONSTRUCTION COMPANY, AND VIRGINIA-CAROLINA RAILWAY COMPANY.

(Filed 13 November, 1918.)

1. **Railroads — Liens — Materialmen — Statutes — Interpretation—Notice—Limitation of Action.**

Revisal, sec. 2021, is not repealed by chapter 150, Laws 1913, the later act expressly purporting to be an amendment, and there is no conflict between the two acts that will fall within section 9, Laws 1913, repealing all acts in conflict therewith; nor between section 2021 of the Revisal, and section 2018 as amended, it being the legislative intent to extend their provisions to those who furnish materials to the subcontractors of rail-

roads; and, construing the above sections in connection with section 2028 as amended, the furnisher of materials to the contractor on an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when commenced within six months thereafter. Revisal, sec. 2027.

2. Liens—Materialmen—Notice—Subcontractors—Balance Due.

The right of one, who furnishes materials to a subcontractor, to a lien upon the building does not depend upon the state of the account between the contractor and the subcontractor, but upon the amount due the contractor by the owner at the time of the proper filing of the notice in the manner and form required.

ACTION, heard by *Shaw, J.*, upon exceptions to the report of a referee, at March Term, 1918, of FORSYTH.

The plaintiff brought the action for the recovery of $1,526.67, alleged to be due by the defendants, Denton Bros. & Cagle, for materials furnished them, and which were used in the construction of the railroad belonging to the Virginia-Carolina Railway Company, the said firm being subcontractors of the Callahan Construction Company, which held the contract with the railroad company for the construction of a part of its road in Ashe County, in this State.

An extract from that part of the referee's report, which was sustained by the court, is as follows:

"(1) On 2 June, 1913, the Callahan Construction Company entered into a contract with the Virginia-Carolina Railway Company, by the terms of which the former company contracted to construct a line of railway from a point on the State line between Virginia and North Carolina, in Ashe County, which point was at or near a station called Creek Junction, to a terminus at Elkland, in the State of North Carolina.

"(2) Thereafter, on the 18th day of June, 1913, the Callahan Construction Company contracted with the partnership of Denton Bros. & Cagle to sublet to them the work of constructing sections 18, 19, 20 and 21 of the said line of railway, embracing approximately four miles, and being situated in Ashe County, North Carolina. That pursuant to said contract, Denton Bros. & Cagle constructed all of the said sections, with the exception of section 18, the work of constructing which was by agreement taken over by the Callahan Construction Company.

"(3) That thereafter, under a contract with Denton Bros. & Cagle, the Atlas Powder Company sold and delivered to the said firm for use in the construction of the said sections of railway certain explosives, and the said explosives so furnished were actually used in the construction of these sections. Under this contract the first of said explosives was furnished on 19 July, 1913, and the last explosives were furnished on the 29th day of November, 1913, and deliveries were made from time to time during the period intervening those dates.

"(4) That for said explosives, Denton Bros. & Cagle are indebted to the Atlas Powder Company in the sum of $1,526.67, with interest thereon from 28 November, 1913.

"(5) That on 16 May, 1914, within six months from the date when the last explosives were furnished, the Atlas Powder Company caused to be duly served upon the Virginia-Carolina Railway Company and upon the Callahan Construction Company notices setting forth itemized statements of its debt against Denton Bros. & Cagle and asserting its claim to a lien against the property of the said railway company, and also its right to priority of payment of its debt out of any funds then due or thereafter to become due from the Virginia-Carolina Railway Company to the Callahan Construction Company, and to priority of payment out of any funds due or to become due from the Callahan Construction Company to Denton Bros. & Cagle. Also, on 28 May, 1914, the Atlas Powder Company filed a statement of its claim to a lien against the property of the Virginia-Carolina Railway Company in the office of the Clerk of the Superior Court of Ashe County, North Carolina.

"(6) That on 10 November, 1914, within six months after it had served the notices above mentioned, the summons was issued in this cause by the Atlas Powder Company to institute suit for the recovery of the amount due for the explosives furnished Denton Bros. & Cagle and used by them in constructing the said sections of railway.

"(7) That the Virginia-Carolina Railway Company became indebted and paid to the Callahan Construction Company subsequent to 31 May, 1914, the sum of $75,830.43 on account of their contract for the construction of their line of railway in North Carolina, and of this amount the sum of $3,384.89 was for sections 19, 20 and 21, the sections upon which the explosives furnished by the Atlas Powder Company had been used.

"(8) That the Callahan Construction Company, on 18 June, 1914, received on its contract with Virginia-Carolina Railway Company payments aggregating the sum of $29,399.17, and that after said date it received the aggregate sum of $19,285.63.

"(9) That from the itemized statement of the estimate furnished Denton Bros. & Cagle by Callahan Construction Company, the estimate of 20 June, 1914, amounted to the sum of $1,028.69."

The referee found as a conclusion of law:

1. That as plaintiff had not filed its notice of lien with the railway company within thirty days after the materials were furnished by it, and did not commence suit to enforce its lien within ninety days after such notice was given, as required by Public Laws 1913, ch. 150, sec. 2018, it had no lien on the funds in the hands of the railway company

or Callahan Construction Company belonging to Denton Bros. & Cagle and was not entitled to judgment against the railway and the Callahan companies, or either of them, but that it might have a personal judgment against Denton Bros. & Cagle if they had been personally served with a summons, which was not done. He sustained the pleas in bar and finally adjudged that plaintiff could not recover, and recommended that judgment be entered dismissing the action and for costs against the plaintiff. The judge sustained some of plaintiffs' exceptions to this report, and overruled some of its findings as to fact and law, and entered a judgment of which the following is a part:

"It appearing to the satisfaction of the court that defendants James Denton and others, trading as Denton Bros. & Cagle, and as Denton Bros., are indebted to the plaintiff in the sum of $1,526.67, with interest thereon from 28 November, 1913, for materials, consisting of powder and other explosives, which were furnished said defendants by the plaintiff and used by said defendants in execution of the contract existing between them and the Callahan Construction Company for the construction of sections 19, 20 and 21 of the line of railway of the Virginia-Carolina Railway Company, said sections being located in the county of Ashe, North Carolina, and that plaintiff, on 16 May, 1914, and within six months from the date when the last of said materials were furnished caused to be served upon the Virginia-Carolina Railway Company and Callahan Construction Company notice of lien, as required by the provisions of chapter 48 of the Revisal of 1908, and the acts amendatory thereof, and that on 28 May, 1914, the plaintiff filed a statement and notice of its claim of lien against the property of the Virginia-Carolina Railway Company in the office of the Clerk of the Superior Court of Ashe County, North Carolina; and that the plaintiff began to furnish to the defendants Denton Bros. and Denton Bros. & Cagle the materials as aforesaid on 19 July, 1913, and finished furnishing said materials on 29 November, 1913, deliveries being made from time to time during the period intervening between these days, all in accordance with a contract for said materials between the plaintiff and the defendants Denton Bros. & Cagle and Denton Bros."

The court thereupon adjudged that plaintiff recover of the railway company and the Callahan Construction Company the sum of $1,028.69, the amount due to Denton Bros. and Denton Bros. & Cagle, and declared the sum to be a material furnisher's lien under Revisal of 1908, ch. 48, and amendments thereto, upon the line of the railway company in the county of Ashe, and particularly upon sections 19, 20, and 21 thereof, as of 19 July, 1913, the referee having held that the act of 1913, being chapter 150 of the Public Laws of that year, was the only law upon the

subject, it having repealed sections 2018, 2021, 2022, 2027 and 2028 of the said Revisal.

From the judgment both parties appealed. The plaintiff because it claimed to be entitled to recover $1,526.67 and interest, or its entire claim, with a lien therefor under the statute, and defendant because it claimed that plaintiff was not entitled to recover anything, neither under the statute before mentioned nor under its garnishment proceedings, as this State is not the *situs* of the debt.

Philip Williams and Manly, Hendren & Womble for plaintiff.

S. C. Bouie, S. P. Graves, A. E. Holton, and L. M. Swink for defendants.

WALKER, J., after stating the case: The contention of the defendants is that chapter 150 of Public Laws 1913 repeals sections 2021 and 2022 of the Revisal in respect to the lien of mechanics, laborers, artisans, for work and labor done in the construction or repair of a railroad, and of persons who furnish material for the same, and that now the only lien, and remedy to enforce it, is that given by the said act of 1913, and that as plaintiff's notice of lien was not filed with the railroad company in this case within the time fixed by section 2018, they cannot recover; while the plaintiff contends that section 2021 was not repealed by Laws of 1913, and is still in force, and as the notice was given within the time fixed by section 7 of chapter 150 of those laws, they are entitled to recover the full amount due to them by the subcontractors to whom they furnished the materials which were used on sections 19, 20 and 21 of the railroad.

The referee held with the defendants, and the judge sustained plaintiff's exceptions to the report of the referee, but gave judgment only for a part of the claim, though he was of the opinion that the Laws of 1913 did not repeal sections 2021 and 2022 of the Revisal. This conclusion was reached because the presiding judge held that the amount to be recovered did not depend upon the state of the account between the owner of the railroad and the contractor, but upon that between the contractor and the subcontractor.

The judge held correctly that chapter 150 of the Laws of 1913 did not repeal section 2021 of the Revisal, but we think he erred in holding that the state of the account between the owner and the contractor is not the standard by which to measure the amount of the plaintiff's recovery.

The Laws of 1913 did not repeal section 2021 of the Revisal because, on its face, it purports simply to amend it as follows: "And after the notice herein provided is given, no payment to the contractor shall be

a credit on or a discharge of the lien herein provided." It would appear from this that the Legislature intended to continue that section in full force and effect. Chapter 150 of the Laws of 1913, contains the following sections:

"Sec. 9. That all local lien laws are hereby repealed, and all laws and parts of laws in conflict with this act, whether local or public, are hereby repealed.

"Sec. 10. This act shall be in force from and after its ratification."

Those sections do not repeal section 2021 of the Revisal because there is no conflict between that section and the Laws of 1913, chapter 150. The supposed conflict is said to exist between section 2021 of the Revisal and section 2018, as it appears in the Laws of 1913, chapter 150, but the two sections can be easily reconciled.

Section 2018 was amended by Laws of 1913 so as to extend the benefit of its provisions to those persons who furnish materials, and, further, it allows notice to be given to the railroad company, in the case of a laborer, within twenty days after the performance of labor for thirty or a less number of days, and, in the case of one who has furnished material, where the contractor has become indebted for more than thirty days for material, the notice must be given within thirty days after the materials were furnished, by the person who furnished the materials.

Under section 2021 and section 2028, as amended by the Laws of 1913, chapter 150, the statement of the account is required to be delivered to the owner at any time before he has paid the contractor and within six months after the completion of the labor or the final furnishing of the materials. It, therefore, appears that there is a substantial difference between section 2018 and section 2021 as amended by the Laws of 1913. Besides, section 2028, as amended by those laws, reads as follows: "Notice of lien shall be filed, as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials or the gathering of the crops." The "shorter time" here mentioned evidently refers to the notice required to be given by section 2018, and it was intended to provide for a longer time within which to give notice, that is, six months, where the transaction has been completed by the "final furnishing" of the materials, and this is that kind of a case. The notice, therefore, was given in due time and it becomes unnecessary to consider the question raised as to the legal effect of the garnishment proceedings.

The second question relates to the amount of the recovery. The court held that plaintiff was entitled to recover the sum of $1,028.69, while the plaintiff insisted that it was entitled to judgment for the full amount of its claim, or $1,526.67, and whether the one amount or the

other should be allowed depends, as we have intimated, upon the question whether the true amount is to be determined by the state of the account between the railroad company and the contractor or between the latter and his subcontractor. It is manifest from a simple reading of the statute, as we think, that its meaning is that the plaintiff shall receive the full amount of his just claim for materials furnished by it, provided there is so much due by the railroad company to the contractor when the notice is given, as provided by the law, and it has been so held by this Court.

The question arose in *Brick Co. v. Pulley,* 168 N. C., 371, where, as the syllabus of the case shows, the Court decided: "The claimants for liens for material, etc., furnished for building, under Revisal, secs. 2020 and 2021, are not only required to show, in order to establish their liens, that the materials were actually used in its construction, but that they were furnished to some one having contract relations to the work. Revisal, sec. 2019. One who has furnished material used in the construction of the building under contract with the subcontractor, by giving the proper notice to the owner, is substituted to the rights of the contractor, and his lien is enforcible against any and all sums which may be due from the owner to him at the time of notice given or which are subsequently earned under the terms and conditions of the contract. Revisal, secs. 2019, 2020, 2021. One furnishing material to a subcontractor, which is used in a building, who gives to the owner the notice required by statute before payment made to the contractor, acquires a right to enforce his statutory lien regardless of the state of the account between the contractor and the subcontractor."

Justice Hoke says, in the opinion of the Court as delivered by him: "Where such lien arises under the provisions of the statute, it does so by substituting the claimant to the rights of the contractor, enforcible, as stated, against any and all sums which may be due from the owner at the time of notice given or which are subsequently earned under the terms and stipulations of the contract. In well-considered cases it is said to amount to an assignment *pro tanto* of the amount due or to become due from the owner to the principal contractor, and this regardless of the state of the account between the principal contractor and the subcontractor, who may be the debtor of the claimant."

And again, when quoting from *Vogel v. Luetwieler,* 130 N. Y., 190: "The respondent makes the further point that it does not appear that the contractor is indebted to the subcontractor, Poppet, for the work and labor and material furnished in painting the house, and for that reason the appellant did not establish a valid lien on the premises. We cannot assume that Poppet has been paid, and until the contrary appears, it may be presumed that he has not been, as a liability once

created is supposed to continue until it is shown that it has been discharged. But if it appeared that Poppet had been paid for the work and labor which he performed, the right of the appellant to place a lien upon the premises as a security for his debt was not thereby extinguished, for the right was secured to him by statute, and its validity is not made to depend upon the question whether his vendee had been paid by the party with whom the latter contracted to do the work and labor. Such a construction placed upon the statute would contravene and defeat its express objects and purposes, and so far as it was intended as a protection for materialmen and laborers it would enable the contractor and subcontractor, by concert of action, to deprive them of the benefits of the statute."

The same was held in *Powell v. Lumber Co.*, 168 N. C., 632, the legal purport of that case being that where the furnisher of material to a subcontractor has notified the owner of the building or other structure upon which the work is being done and perfected his lien, as required by the statute, and it appears in an action to enforce the lien that the owner is still indebted to the principal contractor in a sufficient sum to pay the amount due for the materials which, as here, have been used in the work of construction, the same is applicable to the payment of the claimant's demand to the extent necessary for that purpose, regardless of the state of accounts between the contractor and the subcontractor, citing *Brick Co. v. Pulley, supra.*

Any injustice in disregarding the state of the account between the contractor and the subcontractor is more apparent than real, if there is any at all, for the contractor can protect himself by the exercise of proper care and diligence. The idea is that the materials have benefited the property upon which they were used—here that part of the railroad allotted to the subcontractor—and it is nothing but right that the materialman should be compensated. The railroad company is not harmed because it only pays out what it justly owes.

The court should have given judgment for the full amount of plaintiff's claim, and it will be corrected in this respect.

Error.

MARY FREEMAN ET AL. v. J. W. LIDE, EXR., ET AL.

(Filed 20 November, 1918.)

1. **Constitutional Law — Married Women — Separate Property—Wills—Devise—Deeds and Conveyances—Statutes.**

   Under the provisions of Article X, sec. 6, of our Constitution, and as later declared by our statutes, a married woman may now devise and bequeath her separate real and personal property as if she were a *feme sole*, which does not apply to a conveyance of her realty by deed.

2. **Constitutional Law—Trusts—Uses and Trusts—Statute of Uses—Married Women—Wills—Devise—Powers of Disposition.**

   A devise of land to the husband in trust that he will "take, hold and receive the same for the sole and separate use of" his wife, her heirs and assigns; whether since the adoption of the Constitution of 1868, Art. X, sec. 6, as to her separate estate, equity would regard the naked legal title as being in the trustee, and unite it with the equitable title in her, or regard the trust as an active one, *Quære;* and *Held*, in the absence of any prohibitory terms in the instrument, the constitutional power given to the wife to devise her lands as if she were unmarried will be read into the instrument; and her devise, taking effect at her death, necessarily with the termination of the purpose of the trust, is valid and enforcible.

3. **Constitutional Law — Constitution of 1868, when Effective — Adoption—Approval by Congress.**

   Our Constitution of 1868, in this case, with relation to the separate property of a *feme covert*, Art. X, sec. 6, took effect upon its adoption by the State, and not from the later date when Congress approved it.

ACTION, heard by *Adams, J.*, upon a case agreed, at September Term, 1918, of RICHMOND.

On 17 June, 1868, Mrs. Harriet H. Strong executed and delivered her deed to John H. Williamson, husband of Phebe Williamson, conveying the undivided one-half of all the property, real, personal and mixed, which belonged to the grantor as heir at law, devisee and distributee of Henry W. Harrington, except the annuity settled upon the grantor by the will of Henry W. Harrington. The trusts declared in the deed are thus stated: "But in trust, nevertheless, that the said party of the second part will take, receive and hold the same for the sole and separate use of the said Phebe Williamson, her heirs and assigns, forever."

The above is the only declaration of trust found in the deed, and the only language of the deed describing the duties of the trustee or imposing any duties upon him—that is, that he shall "take, receive and hold." Mrs. Williamson, as stated in the deed, was the object of Mrs. Strong's affection and bounty. Mrs. Williamson died in November, 1910, leaving a last will and testament, and by it devised all her estate, particu-

larly naming the trust estate, to her husband, Dr. John H. Williamson. All the children of Dr. and Mrs. Williamson had predeceased their mother and father. The will was duly admitted to probate. Under it, Dr. Williamson took possession in his own name of the estate of his wife, and at his death left a will disposing of it. His will was duly admitted to probate. And under it, and acting by order of the court, the land has been sold and purchased by various and sundry persons. The plaintiffs are the collateral kin and heirs at law of Mrs. Williamson. The defendants demurred to the complaint, which set out in detail the facts, and his Honor, *Judge Adams,* sustained the demurrer, and plaintiffs appealed.

Lorenzo Medlin, H. S. Boggan, and Stack & Parker for plaintiffs.
F. W. Bynum and J. S. Manning for defendants.

WALKER, J., after stating the case: The question presented is, Did the property conveyed by the deed of Mrs. Strong of date 17 June, 1868, pass under the will of Mrs. Williamson to her husband, Dr. John H. Williamson?

The deed of Mrs. Strong was executed after the adoption of the Constitution of 1868, which took effect for purposes of domestic policy, and so far as the question in this case is concerned, in April, 1868, and not when Congress approved it. This was held in the following cases: *Pemberton v. McRae,* 75 N. C., 497; *Lash v. Thomas,* 86 N. C., 313; *Zheen v. Summey,* 80 N. C., 188; *Comrs. v. Call,* 123 N. C., at p. 321. See, also, *S. v. Cantwell,* 142 N. C., 604, and *Reade v. Durham,* 173 N. C., 668.

The question, therefore, must be determined in view of the constitutional provision contained in article 10, section 6, which reads as follows: "The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband, and may be devised and bequeathed and, with the written assent of her husband, conveyed by her as if she were unmarried."

We need not consider what were the rights of a married woman at common law, or whether she could, before the adoption of the Constitution of 1868, devise or bequeath her property, real or personal, as whatever the law may then have been, it is perfectly clear that under article 10, section 6, of the Constitution, she has such a right by its express language, and this right has since been confirmed by statute. Acts of 1871-2, ch. 193, sec. 31; Battle's Rev., ch. 69, sec. 31; Code, sec.

2138; Revisal, sec. 3133. The statute and the Code giving the power to will property "subject to the husband's right of curtesy," and the Revisal giving it absolutely.

We need not consider whether, by the Constitution, she has the absolute right to devise and bequeath her property unaffected by the restriction of the statutes as to the husband's curtesy, for here, by her will, she devised the property in dispute to her husband, and instead of getting a life estate as tenant by the curtesy, he acquired the fee. The Act of 1871-2, ch. 193, sec. 31, provided that a married woman should have the power to devise and bequeath her property as if she were a *feme sole*. *Tiddy v. Graves,* 126 N. C., 620. The Revisal, sec. 3140, provides that a person may by will dispose of "All real and personal estate which he shall be entitled to at the time of his death, and which, if not so devised, bequeathed, or disposed of, would descend or devolve upon his heirs at law or upon his executor or administrator."

But the plaintiffs contend (1) that the words in the declaration of the trust, "to the sole and separate use of the said Phebe Williamson, her heirs and assigns," creates an active trust in the trustee and prevents the statute from executing the use; (2) that the deed being silent as to the method of disposition, Mrs. Williamson was powerless to devise or convey the property.

These contentions of the plaintiffs are rested upon the decision of this Court in *Kirby v. Boyette,* 118 N. C., 244, wherein it was held that the words "for the sole and separate use," or equivalent language qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created, and that the words "sole and separate use" create an active trust not executed by the statute.

The defendants reply that in *Perkins v. Brinkley,* 133 N. C., 154, the Court said: "Prior to the adoption of the Constitution of 1868, the conveyance of land to a trustee for the benefit of a married woman created an active trust, for that the courts inferred it to be the intention of the maker of the deed to secure to her through the medium of a trustee a separate estate, and it fell under that class of uses which were not executed by the statute, as if 'an estate be given to trustees upon a trust for a married woman for her sole and separate use, and her receipts alone to be a sufficient discharge; or if a trust deed permit and suffer a *feme covert* to receive the rents to her separate use, the legal estate will vest in the trustee, and the statute will not execute it in the *cestui que trust.* In all these cases the Court will give this construction to the gift, if possible, for if the statute should execute the estate in the married woman, certain rights would arise to the husband which

might defeat the intention of the donor.' As by the Constitution of 1868, art. 10, sec. 6, 'The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations or engagements of her husband,' etc. The wife is secured in the enjoyment of her real and personal estate and all rents, profits and incomes accruing therefrom. It would seem that the reason which existed for construing a declaration of trust for a married woman created prior to the adoption of our Constitution, as an active trust, has ceased. Such seems to have been the view of this Court as expressed in *McKensie v. Sumner,* 114 N. C., 425."

After reviewing the cases of *Kirby v. Boyette, supra,* and *Hardy v. Holly, supra,* the Court proceeded: "We do not think it improper to say that in the conflict between *McKensie v. Sumner* and other cases referred to in the very learned brief of the plaintiffs' counsel in *Kirby v. Boyette,* and the doctrine as laid down in *Hardy v. Holly* and *Kirby v. Boyette,* we are of the opinion that the principle announced in *McKensie v. Sumner* is more in consonance with the reason of the thing and the status of the wife in respect to her property under the provisions of our present Constitution. It is difficult to see how the mere declaration of trust in favor of a married woman, there being no duties imposed upon the trustee or any ulterior limitation of the estate to be preserved, should prevent the operation of the statute."

It will be noted that the deeds construed in *Kirby v. Boyette, supra; Hardy v. Holly, supra,* and other cases following those were executed before the Constitution of 1868, while the deed in *Perkins v. Brinkley* was executed after the Constitution. So in *Cameron v. Hicks,* 141 N. C., 21, while the deed was executed after the Constitution of 1868, there were contingent remainders to be preserved and powers to be executed which prevented the statutes from executing the use. The phraseology of article 10, section 6, and the use of the words "sole and separate estate" would clearly indicate that the Court in *Perkins v. Brinkley, supra,* correctly construed that section of the Constitution, and would also indicate that the framers of the Constitution did not intend that a married woman should be denied the power and the right of disposition of her property vesting in her by deed or devise, and which, by the use of the words "sole and separate," created in the wife a separate estate. *Walker v. Long,* 109 N. C., 510.

In speaking of the provisions of this section, the Court in that case said: "But that Constitution has wrought very material and far-reaching changes as to the rights, respectively, of husband and wife in respect to her property, both real and personal, and enlarged her per-

sonalty and her power in respect to and control over her property. . . . This provision is very broad, comprehensive and thorough in its terms, meaning and purpose, and plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried, except in the single respect of conveying it. She must convey with the assent of the husband. It clearly excludes the ownership of the husband and such and sweeps away the common-law right or estate he might at one time have had as tenant by the curtesy initiate. The strong, exclusive language of the clause recited above is that the property 'shall be and remain the sole and separate estate and property of such female, the wife,' and to make the provision more thoroughly exclusive it further provides that such property shall not be liable for any debts, obligations or engagements of her husband."

It seems to have been established by the decisions of the Court in this State at the time of the adoption of the Constitution of 1868 that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, becomes vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in *Walker v. Long, supra*, the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. So that it was no longer necessary to invoke the fiction of the law in order to protect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution, *Cessat ratio, cessat lex.*

It will be conceded as clear that the creator of a trust may declare such trusts and upon such terms (provided they be not contrary to law) and limitations upon conveying or disposing of the trust estate as he may please, provided the restraints upon alienation are not contrary to law or public policy, and there is nothing in this section of the Constitution which prohibits it. But in the deed in the instant case there are no ulterior limitations to be preserved. There are no duties imposed upon the trustee; he is not required to rent, collect the rents or pay the rents over or use the property in any way. *Lummus v. Davis,* 160 N. C., 484. Mrs. Williamson being the absolute equitable owner, there are no ulterior limitations to be protected, and under the terms of the deed the trustee has nothing but a bare, naked legal estate, unaccompanied with a single special duty. The deed, having been executed subsequent to the adoption of the Constitution, must be taken and construed to have been made subject to its provisions and with a knowledge of them, and the rules of construction established by the Court before then and thereby becoming a rule of property, could not apply to such

deeds, however applicable to and controlling in the constructions of deeds made prior thereto.

In *Cameron v. Hicks,* 141 N. C., 21 (27), the Court said: "Whether the rule should have been modified by reason of our constitutional provision in regard to the status of married women, as suggested in *Perkins v. Brinkley,* 133 N. C., 154, it is useless to discuss. However this may be, the trust declared by the deed from Coor to Cox is active, and the necessity for the separation of the legal from the equitable estate manifest. There were contingent remainders to be preserved and powers to be executed. This question is discussed and so decided in accordance with all of the authorities in *Swann v. Myers, supra.* It may be that the correct doctrine is to be found by reading the language of *Ruffin, J.*, in *Hardy v. Holly,* 84 N. C., 661, in the light of what is said by *Smith, C. J.*, in *Norris v. Luther,* 101 N. C., 196, and *Clayton v. Rose,* 87 N. C., 106. This would seem to lead to the conclusion that, in the absence of any permissive provision in the deed, the wife could not convey her equitable separate estate, either for life or in fee, as a *feme sole,* but could do so in the manner prescribed for the conveyance of her statutory separate estate, by joining with her husband and privy examination. However this may be, we are not called upon at this time to enter upon this debatable ground."

One of the powers conferred by the Constitution and assured by it to married women, and confirmed by statute, is the power to devise and bequeath her property, real and personal, and the statute has prescribed a method of executing this power—the same as for men. In view, therefore, of the changes made by the Constitution of 1868, art. 10, sec. 6, and the cases above cited, decided since *Kirby v. Boyette, supra,* the doctrine of that case ought not to be applied to trusts declared by deed or will made since the adoption of the Constitution, unless the trust is an active trust, and the mere use of the words "sole and separate use," without other words imposing some active duties upon the trustee or creating contingent estates to be preserved, ought not to prevent the statute from executing the use.

We have thus stated at length the contentions of counsel as to the question whether the use was executed by the statute, if the trust is passive, or whether it was not, because it was an active trust, but we do not deem it necessary to decide the question or to state our view in regard to it, as we are of the opinion that Mrs. Williamson had the power to will her property, as she did, whether this trust is active or not. It was deemed proper to state fully the contentions of counsel, as we have done, so that it would clearly appear that we are not required to decide the case upon any such ground, as there is a foundation upon which it can securely be based.

If the trust created by the deed of settlement is active, and not executed by the statute of uses, so that Mrs. Williamson had only the equitable estate or the use, we yet are of the opinion that she could devise the property conveyed by it under the power given to her in the Constitution, and also in the statute. The trust expired at her death, for it was then no longer necessary that it should continue, as the coverture, or marriage relation, was thereby severed forever. Her will took effect at her death, so that the time when the trust came to an end and that when her will took effect were exactly coincident—one and the same instant. When she died the gift was discharged of the trust and the will took effect so as to pass the property to the devisee. But the identical question has passed under the review of an able and learned Court, which held that a will made under the same circumstances as appear in this case was effective in law to transfer the property to the devisee. *Kiracofe v. Kiracofe,* 93 Va., 591. The facts in that case were that by deed dated 31 March, 1887, John L. Blakemore settled to the separate use of his daughter, Mary E. Kiracofe, a certain tract of land in Augusta County, by conveying the same with general warranty of title to her husband, Benjamin I. Kiracofe, in trust for her benefit. The grantor uses the following language in prescribing the terms of the settlement: "In trust, nevertheless, for the sole, separate and exclusive use and benefit of Mary E. Kiracofe, the wife of Benjamin I. Kiracofe, and free and discharged from all debts, contracts, liabilities, and marital control of said Benjamin I. Kiracofe." The consideration expressed in the deed for this grant was the natural love and affection which the grantor felt and entertained towards his daughter, and by way and for the purpose of making an advancement to her. In December, 1879, Mary E. Kiracofe died, leaving a will in which she devised this tract of land to her children. The Court said: "The sole question presented by this appeal for our determination is whether Benjamin I. Kiracofe, the husband of the testatrix, has an estate as tenant by the curtesy in this land. The statute of 1849, now carried into section 2513 of the Code, expressly confers upon a married woman power to devise her separate estate. This express power under the statute to devise is equivalent to express power in the instrument so to devise. Hence where a married woman has a separate estate such as is created by the instrument under consideration, and the instrument creating the estate does not restrain her power of alienation, she has, by virtue of the statute, complete power of alienation by will. It is not necessary that the instrument creating the estate should contain an express power in her to alien. She has that power under the statute unless it is restrained or withheld from her by the instrument, and if she exercises her statutory power and disposes of the estate by will it deprives the hus-

band of curtesy as effectually as he would have been deprived of it under a similar disposition made by the wife in pursuance of a power vested in her by the settlement. If the married woman has the power to devise, and fails to exercise it, her husband will be entitled to curtesy; but where she disposes of her separate property by will, as she has the right to do unless restrained, the husband's right to curtesy is lost. This question was decided by this Court in *Chapman v. Price,* 89 Va., 392, and more recently in the case of *Hutchings v. Commercial Bank,* 91 Va., 68. It is contended that the decision in the first-named case is *obiter dictum;* that its decision of the question was not necessary in that case because the language used in the instrument then before the court excluded the right of the husband to curtesy. If the court so understood the language in that case it wholly failed to make any allusion to the fact. On the contrary, it placed its decision squarely on the ground that the estate was 'a sole and separate estate,' and the wife having, as she had the right to do, devised the lands in questions, the husband had no curtesy. In the case at bar, the language used in the deed from John L. Blackmore to Benjamin I. Kiracofe, trustee for Mary E. Kiracofe, creates a sole and separate equitable estate in Mary E. Kiracofe. As already seen, there is in Mary E. Kiracofe, under the statute, a complete power of alienation by will, that power not having been restrained by the instrument, and she having exercised that power and devised the estate by her last will to her children, her husband, Benjamin I. Kiracofe, is not entitled to curtesy therein."

It will be noted that there the question was whether the wife's will deprived the husband of his curtesy, and it was held that it did, for the reason that though the wife's estate was held in trust for her separate use and benefit she could, nevertheless, under the Virginia statute of 1849 (Code, sec. 2513), which is worded like our Constitution and statutes, devise that separate estate so that it would operate to take away the estate by the curtesy which, if she had died intestate, would have gone to her husband.

The case of *Kelly v. Alred,* 65 Miss., 495, is substantially to the same effect. We quote the first two headnotes as follows:

"1. Under section 1169, Code of 1880, which provides that 'A married woman may dispose of her estate, real and personal, by last will and testament, in the same manner as if she was not married,' a wife has the right to devise the homestead occupied with her husband, it being her separate property, unaffected by the provision of section 1260 of the Code that 'No conveyance of the homestead interest, when this interest is the separate property of the wife, shall be valid and binding unless signed and acknowledged by the husband living with his wife.'

"2. The provision of section 1279, which gives to the surviving hus-

band the homestead owned by his deceased wife, she having left no issue, was intended to apply only where the wife dies intestate."

In *Hickman v. Brown*, 88 Ky., 377, it was held that a married woman could dispose of her separate estate created by deed or will, as by the statute she is empowered to dispose of an estate so acquired. The separate estate there was acquired under an ante-nuptial contract. The following cases are to the same effect: *Dillard v. Dillard's Exrs.*, 21 S. E., 669; *Bennett v. Hutchinson*, 11 Kan., 398 (opinion by *Judge David J. Brewer*, afterwards Associate Justice of the Supreme Court of the United States); *Emmert v. Hays*, 89 Ill., 11; *Johnson v. Johnson*, 24 S. W. (Ky.), 628 (the will was in favor of the husband, as here); *Allen v. Little*, 5 Ohio, 66, at p. 72, where it is said:

"If a married woman is a 'female person,' she is authorized by the act of 1808 to make a will; and that she is thus authorized seems to be clear beyond a doubt to a majority of the Court. It has been argued by the counsel for the defendant that to give this construction to the statute would be fraught with danger. We are aware of the disabilities under which a married woman labors at common law. We are aware that to some intents she is esteemed as dead in law; that her contracts are not obligatory upon her; that she is not answerable even for crimes committed in the company of her husband. Still, notwithstanding all these disabilities, she may, even in England, convey her lands by fine, and in our own State by deed, if executed by and with her husband. And we do not readily perceive that there is any more danger to be apprehended from permitting a *feme covert* to transfer her land by will than there is in empowering her to convey by deed. . . . We go upon the ground that, by the statutes of 10 February, 1810, a married woman had an unquestionable right to make a will."

And in *Dillard v. Dillard, supra*, it was held that "A woman had no power to dispose of her separate real estate acquired prior to 1 January, 1850, unless the deed or instrument creating the same confers such power; but by Code 1849, ch. 122, p. 3, and Code 1887, p. 2513, she is given power to dispose of her separate property by will."

There is nothing in this deed of trust that forbids Mrs. Williamson to will the property, and therefore there is no express restriction of her power to do so. We are asked, though, if she cannot convey the property, how can she devise it? It is quite evident that the two powers are different in respect to her separate estate. She cannot convey because, if this is an active trust, it would violate the implied condition of the trust and defeat the very object of the trust if she were permitted to do so, as the deed would operate during her life, whereas a will would take effect at her death, when the trust would be closed, or rather when the object in creating it would have been fully attained, and there would

no longer be any reason for continuing the trust. One of the cases we have cited answers this query and points out the difference between her making a deed and a will. *Kelly v. Alred, supra.*

In Gardner on Wills, at p. 96, sec. 26, the question as to the married woman's power to will her separate estate held in trust or not is discussed, and the conclusion we have arrived at is sustained, viz., that a married woman owning an equitable separate estate in fee may, unless prohibited by the instrument creating it, devise the same; and where the power to make such devise is given by the Constitution or a statute, it has the same effect as if incorporated into the instrument creating the estate, unless she is restrained therein from exercising the power, as was held in *Kiracofe v. Kiracofe*, 93 Va., at 591, where the syllabus states the rule.

Our conclusion is that the demurrer was properly sustained.

No error.

FRANK SANFORD, ADMR. WITH THE WILL ANNEXED OF ANNIE DUNLAP, v. JUNIOR ORDER OF UNITED AMERICAN MECHANICS.

(Filed 20 November, 1918.)

1. **Appeal and Error — Case—Service—Time Extended—Agreement—Statutes.**

   An appeal to the Supreme Court will not be dismissed on the ground that the case was not served by the appellant within the statutory time, when the record shows that an extension thereof had been agreed upon, and service of the case had been accepted by the appellee within the extended period.

2. **New Trials—Court's Discretion—Newly Discovered Evidence—Additional Issues.**

   Where the plaintiff's evidence discloses an additional and complete defense, not embraced by the pleadings or issues, and a verdict has been rendered on issues agreed upon, and it appears that the defendant was not previously aware of the evidence thus revealed, but was taken by surprise when it was disclosed, it is within the sound legal discretion of the trial judge to retain the issues and their answer of one in the plaintiff's behalf, and grant a new trial to the defendant on the issue arising from the evidence thus newly discovered, leaving the question of damages open.

3. **Appeal and Error — New Trial — Court's Discretion—Newly Discovered Evidence.**

   In the absence of its abuse, the exercise of the discretion of the trial judge in granting a new trial after verdict, for newly discovered evidence, is not reviewable on appeal.

4. New Trials—Pleadings—Amendments.

Where the evidence of the plaintiff shows a complete defense not embraced by the pleadings or covered by the issues submitted to the jury, and the trial judge, after verdict, orders another trial and a new issue based upon the additional evidence, it is, in effect, permitting the defendant to amend his answer and present the new question, which should be done before the new trial is entered upon.

5. Appeal and Error—New Trials—Findings.

The findings of the trial judge upon which he has ordered a new trial upon an additional issue to those submitted are not reviewable on appeal.

6. New Trials—Court's Discretion—Insurance—Evidence.

Where an issue as to whether the death of the insured was caused by the excessive use of intoxicating liquors is a defense to an action on the policy, under its terms, and it appears upon the trial, from the plaintiff's evidence, that his death was caused by valvular disease of the heart, appearing before his acceptance as a risk, which is also a complete defense under the policy contract, and that the defendant was not previously aware thereof, it is within the reasonable discretion of the trial judge, after verdict, to retain the issue answered in the plaintiff's favor, and to submit alone, on the question of the defendant's liability, an issue as to the new or additional defense, reserving the question as to damages.

ACTION, tried before *Harding, J.*, at May Term, 1918, of RICHMOND.

J. W. Dunlap, at the time of his death in March, 1918, was a member of Ellerbee Council, No. 388, of defendant order, and was duly enrolled as a member of Class B, Funeral Benefit Department, of the National Council of said order, and was in good standing in Ellerbee Council, No. 388, when he died, and by virtue of his enrollment in said Funeral Benefit Department of the order his widow, Annie Dunlap, was entitled to the sum of $500 as a funeral benefit from the National Council of the said order as of the time he died. Due proofs of death were filed with the defendant. Annie Dunlap brought this action to recover the amount alleged to be due by defendant to her, and died during its pendency. T. M. Ewing, her executor, was made party plaintiff, and a new action for the same cause brought within twelve months thereafter. T. M. Ewing died, and plaintiff Frank Sanford, as administrator with the will annexed of Annie Dunlap, was substituted in his place as plaintiff.

Defendant answered, denying liability, and especially because, as it alleged in its answer, John W. Dunlap's death was caused by his intemperate habits, and that it is provided by section 15 of the revised laws of the Funeral Benefit Department, which were in full force and effect at the time the application of John W. Dunlap for membership was filed, and at the time of his death, that no claim should be paid when intemperance was the cause of the death.

The case came on for trial, and the defendant, after abandoning all other defenses, if any others existed, relied solely upon the defense that John W. Dunlap's death was caused by the excessive use of intoxicating liquor, and thereupon submitted the following issues, which were accepted by the plaintiff and the court:

"1. Did the deceased, John W. Dunlap, come to his death by reason of the excessive use of intoxicating liquor?

"2. What amount, if any, is plaintiff entitled to recover?"

Before the trial of these issues by the jury was commenced, "it was agreed, upon the suggestion of the defendant and at its request, that if the jury answered the first issue 'No' the second issue should be answered '$500, with interest from 10 March, 1913,' and it was further agreed that if the jury answered the first issue 'Yes' the second issue should be answered 'Nothing.'"

The jury answered the first issue "No" and the second issue was answered "$500, with interest from 10 March, 1913."

After the verdict was returned, and before the judgment was signed, the defendant moved to set aside the verdict and that a new trial be ordered. The court being of the opinion that the defendant was surprised by the evidence tending to show that John W. Dunlap's death was caused by valvular disease of the heart, set aside the verdict, in the exercise of its discretion, as to the second issue only, overruling the motion of the defendant as to the first issue, and ordered a new trial. The court then permitted the defendant to submit the following issues:

"1. (Retained, with answer thereto, as above.)

"2. Did the deceased die as a result of the disease which demonstrated itself prior to the deceased's admission to the order or of the Funeral Benefit Department?

"3. What amount, if any, is plaintiff entitled to recover?"

The plaintiff excepted to the order for another trial and to the new issue submitted. He also excepted to the refusal of his motion for judgment upon the issues answered by the jury and the agreement of the parties. Plaintiff appealed.

W. R. Jones for plaintiff.
Douglass & Douglass for defendant.

WALKER, J., after stating the case: The defendant's motion to dismiss the appeal because the case was not served within the time fixed by law, or within fifteen days after the court adjourned, is fully met by the statements in the supplemental transcript sent to this Court, which shows that an appeal was taken from the judge's order and refusal to give judgment, and that defendant's counsel were duly noti-

fied thereof and actually accepted service of the notice of appeal and agreed to extend the time for serving the case on appeal to 1 August, 1918, and, besides, accepted service of the case on appeal within the extended time, or on 20 July, 1918.

Defendant's other objections, not appearing in this (plaintiff's) appeal, are not before us (as defendant did not appeal), nor do they appear in the record. Even if they have any merit, we cannot consider them.

But we are of the opinion that the ruling of the judge as to the new issue must be sustained. The contract of insurance contained a provision that no claim should be made "for benefits upon the death of any member from a disease which may have demonstrated itself prior to the member's admission to the order or his enrollment in the Funeral Benefit Department." The case had been tried upon the issue, whether the death was caused by the excessive use of intoxicating liquors, which was answered "No," or in favor of the plaintiff, but during the trial it appeared that the intestate had valvular disease of the heart which was "demonstrated" before he became a member, but this was not known to the order, and it thereupon moved for the submission of an additional issue as to this malady. This the judge allowed, and his power to do so is challenged by the plaintiff. We do not see why, in the exercise of his discretion, he could not submit such an issue. It will not be disputed, and cannot be, that he could have set aside the issue already answered, but this he did not do. What he did was more favorable to the plaintiff, as by retaining that issue intact he preserved to plaintiff the benefit of the jury's answer to it. He found as a fact that defendant had been misled and surprised by plaintiff's testimony at the trial, and was not in fault in asking for only one issue. If this be so, and we cannot review his finding of fact in respect to it, he clearly had the right to grant relief to the defendant.

In *Pharr v. R. R. Co.*, 132 N. C., 418, we held that when there is ground for setting aside a verdict appearing during the trial, and of which defendant had notice, the court could set the verdict aside or not, at its discretion; and in *Fleming v. R. R. Co.*, 168 N. C., 248, that a ruling upon a motion for a new trial because of newly discovered evidence will not be reviewed as it involved the exercise of discretion, citing *Munden v. Casey*, 93 N. C., 97; *Flowers v. Alford*, 111 N. C., 248; and in *Horton v. Railway*, 169 N. C., 108, that such a ruling was still discretionary and not reviewable, though the judge found, and stated, that the evidence was cumulative.

The motion here was substantially to grant an additional issue because of newly discovered evidence, and we can perceive no difference in principle between the ruling here and the one in the second case

cited. It was within the sound discretion of the court to grant the motion in the furtherance of justice and a trial of the case upon its real merits. The plaintiff, in order to overthrow the defendant upon the issue submitted, offered testimony that the intestate had a fatal disease, which produced his death, viz., "valvular disease of the heart," and, therefore, that he did not die from the effects of intemperance. It would not be fair that he should be allowed to avail himself of such proof, which showed a direct violation of the contract, if the disease was properly demonstrated, and then to hold that the court could not, in the exercise of its discretion, allow an additional issue to meet that phase of the case. The matter was still *in fieri*, for there had been no judgment, and the court could have set aside the verdict, ordered a new trial and granted the issue. How can the plaintiff be heard to say that this was not done, but that the court retained the first issue, when this was so manifestly in his favor? If it could set aside the issue and then allow the new issue and a corresponding amendment of the answer, why could it not add an issue without disturbing the first issue as it then stood? It was better for the plaintiff that the court merely added the issue, for he will merely have to succeed on one issue—that is, as to the valvular disease of the heart—while if the verdict had been set aside and the two issues were submitted he would have to succeed as to both of them.

We attach no importance to the agreement as to the original second issue, which is not unusual where there is no dispute as to the amount of the recovery. It only meant that if the two issues remained as they then were, and the first was answered "No," the amount of recovery should be five hundred dollars. And it will be so again, for if plaintiff gets a favorable answer to the first two issues he will recover the same amount. It was not agreed that he should be entitled to judgment upon such a verdict upon the two issues, but it was intended merely for the guidance of the jury as to the amount.

The order of the judge submitting the new issue was impliedly equivalent to allowing an amendment of the answer to correspond with it, and this amendment should be formally inserted in the pleading. This can be done before the next trial. As we have said, the whole matter is still in the breast of the court, and we would be shortening its arm and lessening its power of control and supervision of the proceedings in court, thereby disabling it to perform its proper functions, should we unduly restrict its discretion in such a matter as the one in question and in like cases. This discretion is judicial, and not merely personal, and certainly not an arbitrary one. It may be called the will of the judge, but it is to be exercised under the guidance of his sound judgment, and not hastily or capriciously. The rights of all the parties

should be considered and respected and due regard given to them. We do not review the decision unless the exercise of this power is plainly abused. *Lancaster v. Bland,* 168 N. C., 377; *Adickes v. Chatham,* 167 N. C., 681; *King v. McRacken,* 168 N. C., 621.

We held in *Cauley v. Dunn,* 167 N. C., 32, that a motion for an amendment, after hearing the evidence, was addressed to the discretion of the court, and is not reviewable. In *Blackwell v. R. R. Co.,* 111 N. C., at p. 151 (first headnote), it is said: "The trial court may exercise a discretion in altering or substituting issues when those so altered or substituted will permit any specific view of the law arising out of the testimony to be presented."

It may be that the new issue as allowed should be somewhat changed in form, so as to present more definitely and plainly the question to be tried, or, in other words, the particular disability, with its name, which is alleged to avoid the policy, so that the jury may not be misled.

There was no error in the ruling of the court.

No error.

CARMA STRIDER v. GEORGE R. LEWEY.

(Filed 20 November, 1918.)

1. Seduction—Actions—Parties—Infants—Female.

An action for damages for seduction may be maintained by a female under 21 years of age, in her own name and right, against her grandfather, upon the ground that he took advantage of his influence over her innocence and virtue to accomplish his unlawful purpose.

2. Incest — Seduction — Criminal Law—Accomplice—Influence—Evidence—Questions for Jury.

While, generally, an action will not lie when the plaintiff must necessarily base the cause of action on her own violation of the criminal law, and a single act of sexual intercourse, within the prohibited degree of consanguinity, constitutes the offense of incest, the consent of the female is not always essential to the guilt of the male; and where the defendant is the grandfather of the plaintiff in a civil action, and there is evidence tending to show that he had raised her from her infancy; had slept in the same bed with her, and, at the age of 16, by the exercise of his influence, had induced her to believe the act was not wrong, and thus designedly accomplished his purpose when she was innocent and virtuous: *Held,* it is for the jury to determine whether the plaintiff was a voluntary accomplice in the commission of the crime, or whether she yielded under the undue and dominating influence of the defendant.

ACTION, tried before *Shaw, J.,* at February Term, 1918, of ROCKINGHAM.

At conclusion of the evidence of plaintiff a motion to nonsuit was sustained. Plaintiff appealed.

Percy T. Stiers, J. R. Joyce, and Brooks, Sapp & Kelly for plaintiff.
E. R. Scott, C. O. McMichael, P. W. Glidewell; and Manly, Hendren & Womble for defendant.

BROWN, J. The plaintiff sues to recover damages for seduction, alleging that the defendant, her grandfather, took advantage of her youth and inexperience, and with wicked and diabolical design upon her innocence and virtue induced her to submit to his wishes and have sexual intercourse with him. The defendant denies the seduction and sexual intercourse.

Upon the conclusion of plaintiff's evidence, defendant moved to nonsuit, contending: (1) That the plaintiff being a minor cannot maintain the action for seduction, as the cause of action is in her father. (2) In order to establish her claim, she must rely upon a criminal transaction, to which she is a party, viz., carnal intercourse with a grandparent, which makes *her* guilty of incest, a felony.

The right to maintain this action by this plaintiff is upheld in *Hood v. Sudderth,* 111 N. C., 220, cited and approved in many subsequent cases and at this term in *Tillotson v. Currin.* In this last-named case it is also held that the father may recover for the loss of services of his daughter while a minor.

As to the second position of defendant, we recognize the general principle that an action never lies when the plaintiff must necessarily base the cause of action on a violation by himself of the criminal law. *Lloyd v. R. R.,* 151 N. C., 566; *Hinton v. R. R.,* 172 N. C., 587. Therefore, it follows that if plaintiff, upon her own evidence, is necessarily guilty of incest, the nonsuit was properly allowed. We are of opinion, however, that the cause should have been submitted to the jurors upon proper issues and instructions, to the end that they should determine the question as to whether the plaintiff was guilty of incest or not.

It is true that a single act of sexual intercourse between persons related within prohibited degrees of consanguinity constitutes incest, but the consent of the female is not essential to the guilt of the male. The crime of incest may be committed by the male without the consenting mind of the female. *Taggert v. State,* 111 Am. St. Rep., 24, and cases cited. The mere fact that this plaintiff submitted to her grandfather, under the evidence, does not make her necessarily an accomplice in the crime.

In *Porah v. State,* 48 A. St. Rep., 959, the Supreme Court of Wisconsin says: "It does not necessarily follow in such cases that the

female is to be regarded as an accomplice, and particularly in a case like the present, in view of the relation between the parties and the coercive authority of her father over her. *Raiford v. State,* 68 Ga., 672; *Norton v. State,* 106 Ind., 163. If, in the commission of the incestuous act, the female was the victim of force, fraud, or undue influence, so that she did not act voluntarily and join in the commission of the act with the same intent that the accused did, then she ought not to be regarded as an accomplice. In all such cases, where it is to be proved inferentially, the question of accompliceship is one of fact for the jury. Wharton's Criminal Evidence, sec. 440; *Mercer v. State,* 17 Tex. App., 452."

In *Shelly v. State,* 95 Tenn., 152, the Court holds that a woman who consents to incestuous intercourse voluntarily and with the same intent that actuated the man is guilty as his accomplice, but it is otherwise if she was the victim of force, fraud or of undue influence. To same effect is *Freeman v. State,* 11 Tex., 92; 40 Am. Rep., 787, and cases cited.

The weight of precedents is to the effect that in the crime of incest there may be a certain strong influence exerted, resulting from the relationship and circumstances of the parties and the age of the female which overcomes her objections without amounting to that degree of violence which would constitute rape. *Raiford v. State,* 68 Ga., 672; *Taggert v. State,* 111 Am. St. Rep., 24. We think there is evidence of such dominating and undue influence exerted by defendant over plaintiff, causing her to submit to his wishes.

The plaintiff is the granddaughter of defendant and had resided with him since she was five years of age. Her grandmother, defendant's wife, died in March, 1916, leaving only plaintiff and her grandfather in the house. The plaintiff did the housework and cooking. She had been in habit of sleeping with defendant, her grandfather, ever since her early childhood. On the night of 5 May, 1916, when plaintiff was sixteen years of age, she slept as usual with defendant. She testifies that about midnight he arose, saying he was in great pain. "I asked him what he wanted, and he said he wanted me to give him ease, that his privates hurt, but did not want me to do anything wrong; that the Bible said that what he wanted was not wrong; that I could ask my grandmother or any one else I wanted to. I did not know whether it was wrong or not; nobody had ever talked to me. I took his word for it and believed him. He kept telling me that there was no harm; that the Bible said not to commit adultery, but this was not adultery. After this talk he just went on himself and had sexual intercourse with me. The next morning he told me to say nothing about it; that he would kill me; and this was the first time that I suspected that it was wrong. On the 7th of May I told my mother about it. She told me not to sleep

with him, that it was wrong, and to make him send me off. No other man had ever had intercourse with me or said anything like that to me. I am the mother of a child, which was born 6 February, 1917, and the defendant is its father."

The plaintiff introduced witnesses who testified to her general good character.

The evidence should have been submitted to the jury for their consideration, and it should have been left to them to determine whether the plaintiff was a voluntary accomplice in the commission of the crime, or whether she yielded because of the undue and dominating influence of the defendant. Their relations were such as to give him a very powerful influence over her. He had raised her and slept with her since her early childhood. She was ignorant, and if her testimony is to be believed, entirely ignorant of what sexual intercourse meant. Defendant assured her it was harmless and according to the Bible and exerted all his parental influence to compel her to yield to his purpose. Two days afterwards, when she learned the effect of what she had done and its immorality, she told her mother about it. If plaintiff's evidence is to be believed, a jury could reasonably draw the inference that she was the victim of defendant's fraudulent and undue influence, and not his voluntary accomplice. It is for the jurors to draw the inference, and not the judge.

New trial.

GEORGE E. GILL ET ALS. v. MAE HINSON PORTER ET ALS.

(Filed 20 November, 1918.)

1. Limitation of Actions—Tenants in Common—Deeds and Conveyances—Adverse Possession.

Where the grantee of a tenant in common of the entire tract of lands enters into possession of the whole thereof, the statute of limitations begins to run against all of the tenants in common, or their grantees, from that time; and the position that such grantee acquired only the undivided interest of his grantor in the commonable land is untenable, being contrary to the express terms of the conveyance and the character of the possession held thereunder.

2. Same—Judgments—Estoppel—Parties—Privies—Evidence—Declarations.

The grantee of a tenant in common of the entire tract of land before the institution of proceedings to partition them is not a privy to such proceedings or estopped by the judgment therein; and where he has entered under his deed and claims title by adverse possession, the acts or declarations of the parties to the proceedings cannot affect his rights.

CLARK, C. J., and ALLEN, J., concur in the result.

GILL *v.* PORTER.

PARTITION PROCEEDING begun before the Clerk of the Superior Court of RICHMOND. The defendant, Mrs. Mae Hinson, pleaded sole seisin. Whereupon the cause was transferred to term and tried July, 1918, before *Adams, J.*, upon these issues:

1. Was the deed from A. W. Porter to Mae Hinson Porter executed, delivered, and recorded prior to 28 April, 1914? Answer: "Yes."

2. Are the plaintiffs, or any of them, estopped by reason of the action and judgment in the Superior Court of Wake County? Answer: "Yes."

3. Have Mae Hinson Porter and those under whom she claims been in the open, adverse, and exclusive possession of the land in controversy for twenty years before the commencement of this action under known and visible lines and boundaries? Answer: "Yes."

4. Are the plaintiffs, or any of them, tenants in common with Mae Hinson Porter of the lands described in the complaint? Answer: "No."

From the judgment rendered plaintiffs appealed.

A. R. McPhail, John G. Mills, and James S. Manning for plaintiff.
W. R. Jones and Stack & Parker for defendants.

BROWN, J. It is useless to consider any assignments of error except such as relate to the third issue, for if that finding stands the plea of sole seisin interposed by Mrs. Mae Hinson Porter must be sustained.

The evidence discloses that David Gill owned the land in controversy and lived on it in 1865. He then removed to Wake County. His son, Henry P. Gill, then took possession and remained on the land until his death in 1896. On 29 May, 1896, immediately preceding his death, he conveyed the entire tract of land to Daniel M. Morrison, who took possession and there remained until he conveyed the land to John P. Cameron and John M. Smith on 10 February, 1901. They entered and held possession until they sold to C. V. Williams and A. W. Porter, conveying to each separate parts of the land. A. W. Porter took and held possession of his part, being the land in controversy, until he conveyed to his wife, Mae Hinson Porter, on 2 July, 1913. She has been in possession from then until the trial.

The judge correctly instructed the jury that the statute of limitations did not begin to run until 29 May, 1896, when Henry P. Gill conveyed the entire tract to Morrison, who then entered and claimed the land as his own.

The contention that the deed from Henry P. Gill to Morrison purports to convey only the interest of a tenant in common owned by the grantor cannot be maintained. The deed purports to convey the entire tract of land in fee simple and with full covenants of warranty. No matter what was the legal effect of the trust deed of 1882, the deed from

H. P. Gill to Morrison constitutes good color of title to the entire tract described in it. When Morrison entered into possession under that deed, claiming the whole of the land, the statute began to run against the trustee, D. D. Gill.

Assuming that the possession of H. P. Gill was not adverse to the other children of David Gill, the possession of Morrison and those claiming under him has been adverse for more than twenty years up to 16 January, 1917, when the defendant Mae Hinson Porter was made a party to this proceeding.

It is true, as contended, that A. W. Porter, John P. Cameron, and others were adjudged to be tenants in common of this land with plaintiffs, but no such adjudication was made against Mrs. Porter. She was not a party to the action and is in no manner bound by the decree. The plaintiffs contend that if Mrs. Porter relies upon the possession of her husband, she can tack it to hers only in the character it had been adjudicated to be. This is true if she had purchased from her husband pending the action, but he was not in possession when that action was begun on 28 April, 1914. The record shows that he had conveyed to Mrs. Porter by deed recorded 2 April, 1914. By operation of law, the tenants on the land became her tenants on that date, and from thence she became entitled to the rents. Her possession then became adverse to all the world, including her grantor. *Barrett v. Brewer,* 153 N. C., 552.

Mrs. Porter obtained her title and possession by "purchase" on 2d April, 1914, and the suit entered against A. W. Porter on 28 April, 1914, was against one who had neither title nor possession; and any answer filed in that suit by A. W. Porter, or any statements or conduct of his in that case cannot affect the title of his grantee. Any declaration or acts of A. W. Porter after the delivery of his deed were incompetent against Mrs. Porter in disparagement of her title or her possession. *Ward v. Saunders,* 28 N. C., 382; *Hodge v. Spicer,* 79 N. C., 223; *Headen v. Womack,* 88 N. C., 468; *Grandin v. Triplett,* 173 N. C., 732.

There is a marked distinction between this case and *Locklear v. Bullard,* 133 N. C., 264, relied on by plaintiffs, in that A. W. Porter was not a tenant in common in possession. He had parted with title and possession prior to the commencement of the action against him. Mrs. Porter was not in any sense a privy to that action because she acquired both title and possession prior to its commencement. A privy to a judgment is one whose succession to the rights of property affected occurs after the institution of the suit and from a party to it. Bigelow on Estop., p. 142.

The cases cited by counsel for plaintiffs would be in point if the deed from Porter to his wife had been executed after 28 April, 1914, when the action against the husband was commenced.

The charge of the court as to what constitutes adverse possession is strictly correct and need not be commented on as it follows almost *verbatim* the language of this Court in *Locklear v. Savage,* 159 N. C., 236, and quoted with approval in *McCaskill v. Lumber Co.*, 169 N. C., 24.

No error.

W. H. SANDERS ET AL. v. T. C. COVINGTON ET AL.

(Filed 20 November, 1918.)

Taxation — Sales — Purchaser — County—Transferee—Statutes—Deeds and Conveyances.

It is necessary to the validity of the sheriff's deed to land sold for nonpayment of taxes that the statutory notice shall have been given the owner or mortgagee of the land, notice by publication to redeem, etc. (Revisal, sec. 2903), and that the affidavit of the holder of the certificate be filed (Revisal, sec. 2904); and these requirements are not dispensed with when the land is bid in by the county and the bid transferred, and the transferee acquires the deed direct from the sheriff, for the transferee then stands in the same relation to the owner as if he had bid off the property originally, and the special statutory provision as to the county has no application.

ACTION, tried before *Harding, J.*, at May Term, 1918, of RICHMOND.

The cause was heard upon an agreed state of facts. From the judgment rendered plaintiffs appealed.

J. S. Manning for plaintiff.

McIntyre, Lawrence & Proctor, Fred W. Bynum, and W. R. Jones for defendant.

BROWN, J. This action is brought to recover possession of certain land sold for taxes, bid off by the county, and the bid assigned to plaintiffs, to whom the sheriff executed a deed on 22 May, 1917. It is admitted that no notice of sale was given to the owner, Covington, or to the mortgagee, and that no notice to redeem was given or published as required by Revisal, sec. 2903, and also that no affidavit of the holder of the certificate has been filed as required by Revisal, sec. 2904. It has been held that failure in these particulars avoids the sale and deed. *Matthews v. Fry*, 141 N. C., 582; *Rexford v. Phillips*, 159 N. C., 213;

McNair v. Boyd, 163 N. C., 478; *Johnson v. Wilder,* 166 N. C., 104. Plaintiffs, however, contend that as assignee of the bid of the county they were not required to give such notice under Revisal, sec. 2904, which reads, "Should the county become the purchaser, then the provisions of sections 2903 and 2904 shall not apply."

The county of Richmond is not suing to recover the land sold for taxes or to foreclose a lien for taxes. The county transferred its bid to plaintiffs and they received a deed direct from the sheriff. They stand in same relation to the owner of the land as if they had bid off the property originally. It was incumbent upon them to give the notice required by law. As held in *Rexford v. Phillips, supra,* the apparent purpose of this statute is to notify the mortgagee and, through him, the owner of the land of the claim, so that they may save their rights.

Affirmed.

HORTENSE MULLIS, ADMX. OF J. L. MULLIS, DECEASED,
v. R. M. SANDERS.

(Filed 20 November, 1918.)

Negligence—Evidence—Nonsuit—Questions for Jury—Trials.

The evidence tending to show that the plaintiff's intestate, under contract to install the sawmill machinery in defendant's mill and cut his lumber for a certain price per thousand feet, doing the work and furnishing the labor, curved up a key to a pulley, which had theretofore laid with safety along the axle, and, without stopping the swift-running machinery, was soon thereafter caught by the curved end of the key, while he was tightening the pulley, and fatally injured, in the absence of the defendant, of whom the intestate acted independently and without his supervision or control: *Held,* insufficient to take the case to the jury upon the issue of defendant's negligence, or to show that he had failed in the performance of any duty he owed to the intestate; and a motion as of nonsuit upon the evidence should have been granted.

ACTION, tried before *Adams, J.*, at August Term, 1918, of UNION, upon these issues:

1. Did the relation of master and servant exist between defendant and the deceased at the time of the injury and death, as alleged in the complaint? Answer: "Yes."

2. Was the death of the plaintiff's intestate caused by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

3. Did the said intestate by his own negligence contribute to the injuries causing his death, as alleged in the answer? Answer: "No."

4. What damages, if any, is the plaintiff entitled to recover? Answer: "$1,000."

Defendant appealed from the judgment rendered.

Armfield, Brooks & Vann and Stack & Parker for plaintiff.
Redwine & Sikes for defendant.

BROWN, J. We are of opinion that the motion to nonsuit should have been sustained.

The evidence, taken in the most favorable view for plaintiff, tends to prove these facts: The defendant owned a sawmill and engine and also a tract of timber. He entered into a contract with plaintiff's intestate to operate the sawmill at intestate's expense and to haul and cut the timber at $4.25 per thousand feet, the intestate doing all the work and furnishing all the labor. The intestate put down the sawmill and placed all the machinery in position and operated it under his own control and in absence of defendant. During the operation of the machinery the intestate was caught by a piece of iron used as a wedge in tightening a pulley on a shaft, which pulley was used with a belt connected with the sawdust mover which carried off the sawdust. When the intestate took charge of the machinery this iron wedge extended out about two feet, lying on the shaft to hold the pulley, and had been operated in this manner for a considerable time without injury to any one. The intestate, at his own instance, broke off this iron bar, and in breaking it turned up the end extending out from the pulley. In about one hour after he did this he endeavored to put the belt on the pulley which was used in carrying off the sawdust, without stopping the machinery, which was running at full speed. While stooping over the fast-running saw machinery, endeavoring to put the belt on the pulley, his clothing was caught on the projecting piece of iron he had broken and turned up. His head was pulled down on the machine and he received several wounds, from which he very shortly died.

In no view of the evidence is plaintiff entitled to recover. The intestate had complete control of the operation of the sawmill, and defendant had nothing to do with it. All the proof shows that intestate was killed by his clothes catching in the piece of iron he had broken off and bent, and about an hour afterwards. The defendant knew nothing whatever of this and had not been notified by intestate or asked to remedy the trouble. The intestate not only knew of the broken iron, but purposely caused it, and notwithstanding it he operated the mill at full speed and endeavored to adjust a belt while so running.

We are unable to see wherein defendant failed to perform any duty he owed the intestate, assuming, for argument's sake, that the relation of

master and servant existed. The only defect claimed to exist was the bar of iron which the intestate himself intentionally broke off and turned up. He did not notify defendant of it or ask that it be remedied, but continued to run the machinery at full speed. While so running, he recklessly leaned over the rapidly running saw machinery instead of stopping it. His clothing was caught in the iron piece because he had broken it off so that it turned up, and thereby hooked his clothes and dragged him down on the machine. Intestate's death was the result of an accident, the result of his own unfortunate carelessness which no foresight or provision of the defendant could have anticipated or prevented. 5 Thompson on Neg., secs. 5352-5748; *Furnace Co. v. Gross,* 97 Ala., 220; *Lewis v. Simpson,* 29 Pac. Rep., 207.

The motion to nonsuit is allowed.

Reversed.

JOHN STONE v. K. M. PHILLIPS.

(Filed 20 November, 1918.)

1. Taxation — Sales — Deeds and Conveyances —Evidence—Presumptions—Instructions—Trials.

A sheriff's deed to lands sold for the nonpayment of taxes is presumptive evidence that the land was subject to the taxes for the year therein stated; that the taxes had not been paid before the sale; that the property had been listed and assessed; that the taxes had been levied according to law; that the property was sold for taxes, as stated in the deed, and that all statutory notices had been duly served and advertisements duly made; and in an action by the owner against the purchaser at the tax sale, in possession, where the tax deed has been introduced in evidence, and it is admitted that the purchaser's affidavit as to notice and his deed are in due and proper form, a charge of the court to find for the plaintiff, if the evidence is believed, is reversible.

2. Taxation—Sales—Deeds and Conveyances—Tax Lists—Description.

Where land has been conveyed by the sheriff for the nonpayment of taxes, under the statute, it is not required for the validity of his deed that the land should have been described with particularity or detail on the tax list, for the designation thereon is sufficient if it affords reasonable means of identification and does not positively mislead the owner or persons interested.

3. Sale—Statutes—Sheriff's Deed—Reference to Owner's Deed.

Under the provisions of the Revisal, sec. 2895, a sale of land for taxes shall not be invalid by reason of certain irregularities; and section 2896, defining these irregularities, among other things, provides that the description on the tax list will be definite enough if sufficient to enable the

sheriff, or any person interested, to determine what property is meant or intended by the description, and in such case a defective or indefinite description may be made definite by the sheriff in his deed: *Hence*, where the owner has but one lot or tract of land within the corporate limits of a town, and reference to his deed would readily give a full description thereof, the sheriff's deed to the purchaser at the sale for taxes, incorporating this description in his deed, is sufficiently definite of the land therein conveyed to pass the title.

4. Taxation—Sales—Tax Lists—Listing for Taxes—Owner's Name—Principal and Agent—Statutes.

The seeming hardships imposed by Revisal, sec. 2894, declaring that no sale of real estate for taxes shall be valid because the land was charged on the tax list in the name of any other than the rightful owner, is minimized or removed by the last clause of the section, which invalidates the sale, if the rightful owner has listed the lands and paid the taxes, for it was his duty to have done so, and not that of the officials to perform the impossible task of examining into the existence of all title appearing in the registration books.

5. Taxation—Sales—Deeds and Conveyances—Sheriff's Deeds—Description—Listing for Taxes—Owner's Name—Evidence—Instructions—Appeal and Error—Trials.

The owner of lands within an incorporated town sold a part thereof, and the whole of this tract was listed on the tax books in the name of the original owner, designated as that within the town, and, after notice to him and his purchaser, was sold for taxes, and a deed made therefor by the sheriff to a purchaser at the sale for taxes, sufficient in form to pass the title, with description obtained by reference to the deed made to the original owner, who had only this lot of land within the town. The purchaser at the tax sale entered into possession, and the grantee of the original owner brought his action involving the title. Upon the evidence in the case: *Held*, an instruction by the court to the jury to answer the issue for the plaintiff, if they believed the evidence, is reversible error.

6. Taxation—Listing for Taxes—Statutes.

In order for the sheriff's deed to convey the title to the purchaser of lands at the sale for the nonpayment of taxes, it is required that the lands shall have been listed in accordance with the provisions of law—that is, by the owner or duly accredited agent, in cases where listing by the agent is permissible (Revisal, secs. 5217-8); otherwise, by the chairman of the board of county commissioners. Revisal, sec. 5233, etc.; *Rixford v. Phillips*, 159 N. C., 213, cited and approved.

ACTION to recover a parcel of land, tried before *Harding, J.*, and a jury, at February Term, 1918, of MOORE.

The plaintiff, admitted to have been the owner of the lot, sued to recover same. Defendant, in possession, resisted recovery, claiming title under a tax sale and deed from D. Al Blue, sheriff of Moore County, having the tax list of 1912 to collect by virtue of his office, etc.

On issues as to title and right of possession, the court charged the

jury, if evidence believed, to find for plaintiff. Verdict for plaintiff. Judgment, and defendant excepted and appealed.

No counsel for plaintiff.
H. F. Seawell and R. L. Burns for defendant.

HOKE, J. The facts in evidence tended to show that in 1911 one C. H. Jones, a nonresident, owned a lot in the town of Carthage, same having been conveyed to him by the former owner, Vance W. Barrett, in 1905, and the deed duly registered in said county, Book 33, page 294; that in April, 1911, C. H. Jones conveyed a part of said lot to plaintiff, said deed being duly registered on 10 April, 1911; that on the tax list for Moore County for 1912 plaintiff's land was not listed in his own name and the Jones lot was listed as formerly, appearing on the tax lists as "Jones, C. H., one lot, Carthage, $225," and that said Jones owned no other lot in Carthage at that time or before; that the taxes assessed against the lot not having been paid, the same was sold for taxes by the sheriff, at which sale the defendant became the purchaser, and the time having expired and notice having been duly given by the purchaser, by publication as to C. H. Jones, nonresident, and personally on the plaintiff, and neither Jones nor plaintiff, nor any one for them, having offered to redeem the land, the sheriff in October, 1914, conveyed the lot to defendant, describing same by metes and bounds as contained in the original deed from Barrett to Jones, the same including the lot claimed by plaintiff. It was admitted by plaintiff that the affidavit of purchaser, as to notice and the sheriff's deed conveying the land, were in due and proper form and the statute making this deed presumptive evidence: (1) That the real estate was subject to taxation for the year stated in the deed; (2) that the taxes were not paid at any time before the sale; (3) that the property had not been redeemed; (4) that the property had been listed and assessed; (5) that the taxes had been levied according to law; (6) that the property was sold for the taxes as stated in the deed; (7) that all notices required had been duly served and advertisement of said sale duly made; and, conclusive as to the other specified recitals in the deed, we see no reasons on the record as now presented why the possession and title of the purchaser should not have been sustained.

It was suggested for plaintiff that the lot was not sufficiently described on the tax list, and the attempted sale was therefore a nullity; but it will be readily recognized that it is entirely impracticable to spread out anything like a full and accurate description of land on the tax list, reasonable certainty is all that can be required. As said by Mr. Cooley in his work on Taxation: "The designation of land is suffi-

cient if it affords reasonable means of identification and does not positively mislead the owner," a statement of the position approved by the Court in *Fulcher v. Fulcher,* 122 N. C., 101, citing Cooley on Taxation, 407. And in furtherance and extension of the principle, the statute applicable, Revisal, sec. 2895, enacts that a sale for taxes shall not be invalid by reason of certain irregularities; and in section 2896, defining the irregularities, there is specified, among other things, "any defect in the description, upon any assessment book, tax list, sales book or other record, of real or personal property assessed for taxation, or upon which any taxes are levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the sheriff or any person interested to determine what property is meant or intended by the description; and in such case a defective or indefinite description on any book, list or record, or in any notice or advertisement, may be made definite by the sheriff in the deed by which he may convey such property, if sold for taxes, by inserting in such deed a proper and definite description of the property so defectively or indefinitely described."

Recurring to the record, it appears that the property listed as "Jones, C. H., one lot in Carthage, $225," and he having owned one lot, a reference to the registry would disclose a deed to C. H. Jones, giving full description, and which the sheriff no doubt readily found and followed in the tax deed.

In reference to the further position that the tax list shows no land listed as the property of plaintiff, the statute in section 2894 provides: "That no sale of real estate shall be void because such real estate was charged in the name of any other than the rightful owner if such real estate be in other respects sufficiently described. But no sale of real property so listed in the name of the wrong person shall be held valid when the rightful one has listed the same and paid the taxes thereon." Any seeming hardship in thus sanctioning a sale of land listed in another name is minimized or removed by the last clause of this section, which operates in full protection of an owner who has listed his property and paid his taxes, as he is in duty-bound to do, while the contrary position would result in much property being withdrawn from taxation by transfers not put to registry, or requiring officials to enter on the impossible task of examining into the existence of all titles appearing in the registration books before a reliable tax list could be made. The section cited has been approved in principle in *Taylor v. Hunt,* 118 N. C., 168, and other cases.

As the cause goes back for a new trial, we consider it not improper to state further that we have held, in *Rexford v. Phillips,* 159 N. C., 213, that land is not properly listed for taxation, rendering it subject to sale, unless it has been done according to the provisions of law—that

is, by the owner or by his duly accredited agent in cases where listing by an agent is permissible. Revisal, secs. 5217-5218. And where neither has acted, the chairman of the board of county commissioners is authorized to list the same under section 5233, etc.

In *Rexford's case, supra,* neither the owner nor his agent had given in the land, and the list taker had copied the entry from the former tax book, and it was held that the land was not rightfully on the tax list, and a sale for taxes pursuant thereto was invalid. Speaking to the question in that well-considered opinion, *Associate Justice Walker* said: "There were two ways at that time for listing land for taxes. Revisal, secs. 5217, 5222, and 5227, provides that the owner, in person, shall list his property under oath, setting forth in detail how it shall be done, and section 5218 provides that certain persons may appoint agents to list for them. Section 5233 provides that if the owner fails to list at the appointed time, the chairman of the board of commissioners shall list the same, in the name of the owner, by inserting in the tax list the description and valuation of all property not listed by him, and shall charge him with a double tax; and section 5232 provides for the collection of taxes on land which has escaped taxation for previous years by adding to the simple taxes of the current year all taxes due for preceding tax years, with 25 per cent interest thereon. There is no provision in the law for the listing of land by a township tax lister, or in any other way than the one prescribed." . . . And again: "The Legislature has never provided that a person without authority in law or in fact may enter on the lists an indefinitely described number of acres in a township containing many thousand acres, not in the name of the owner, but of some one else, and thereby confer authority to sell lands thus listed, and by the sheriff's deed pass the title to the lands of another person whose name does not appear in the list, and whose lands are not described therein, and who has never authorized the listing of his land by another, and whose land has not been listed by the chairman of the county commissioners as required by law in case of the owner's default."

We are not unmindful of the clause appearing in section 2909 of the Revisal to the effect "that no person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without showing that he or the person under whom he claimed has paid all taxes due on the property," etc. But if it is shown that the property is on the tax list without lawful authority no taxes have thus far been legally assessed against it, and the section therefore would not apply.

For the error indicated there must be a new trial of the cause, and it is so ordered.

New trial.

J. R. SHUTE v. T. J. SHUTE AND J. EARL SHUTE.

(Filed 20 November, 1918.)

1. Contracts — Consideration—Restraint of Trade—Division of Territory—Vendor and Purchaser—Cotton-Ginning Plants.

Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, buying cotton seed, etc., the plaintiff sold the defendant a cotton-ginning plant, the latter agreeing to remove the plant and not to again operate one there, and upon the violation by the defendant of this contract the plaintiff seeks an injunction: *Held*, the intent of the agreement was a division of territory, with the object to eliminate competition therein, making inapplicable the principles upon which a partial restraint of trade, when reasonable, may be enforced in the interest of the vendee; and were it otherwise, the public interest in so large a territory in having cotton conveniently and inexpensively ginned was unreasonably interfered with; and the injunction, being against the principles of the common law and our statutes applicable, was properly dissolved. Laws 1913, ch. 41.

2. Injunction—Judgment—Estoppel.

An injunction obtained in a former action between the same parties, on the same subject-matter, will not operate as an estoppel in the present suit, the remedy being by enforcement of that judgment, and not by a new action.

APPEAL by plaintiff from *Adams, J.*, at July Term, 1918, of UNION.

This was an action to enjoin the erection of a cotton gin in Monroe upon the ground that it was in violation of a contract between the plaintiff and the defendant J. T. Shute.

In May, 1916, J. R. Shute, the plaintiff entered into a contract with J. T. Shute, his brother, who, with his son, J. E. Shute, are the defendants. The contract in question specified that J. R. Shute sold to said J. T. Shute for $4,000 the cotton gin plant in Monroe, specifying the location and its contents, *i. e.*, four 70 brush saw gins and fixtures, one 60-horsepower electric motor and fixtures, and other appurtenances, with a provision that said J. T. Shute should have "the exclusive privilege of buying and selling seed cotton and cotton seed, so far as the said J. R. Shute is concerned, on the south side of Bear Skin Creek for a period of ten years from 1 September, 1916." Said J. R. Shute bound himself "neither to build, nor cause to be built, any ginning plant in Union County on the south side of Bear Skin Creek for a period of ten years after 1 September, 1916, and not to operate, or cause to be operated, or be interested in any way with any person, firm, or corporation, in operating any ginning plant in Union County on south side of Bear Skin Creek for said period of ten years." And there was a further pro-

vision that the defendant J. T. Shute should not engage or be interested in ginning cotton or buying cotton seed or seed cotton, cotton-seed meal, or hulls, for the said period of ten years on the north side of Bear Skin Creek in said county nor on the site of the gin plant which he was then operating near the railroad depot in Monroe, which he agreed to remove, and did remove.

From the judgment dissolving a temporary restraining order and refusing to continue the injunction to the hearing, the plaintiff appealed.

W. B. Love and Stack & Parker for plaintiff.
Frank Armfield and J. C. M. Vann for defendants.

CLARK, C. J. Bear Skin Creek is practically the northern boundary of Monroe. The contract which the plaintiff J. R. Shute is asking the Court to enforce does not contain a provision for the sale of the good-will of the gin plant, and besides, this action is not brought by the vendee to protect the conveyance of the good-will as an exception to the rule against contracts in restraint of trade, but singularly enough it is brought by the vendor to enforce a division of territory by which the vendee was not to engage in the business north of Bear Skin Creek, nor at the location near railroad depot in Monroe, for ten years in consideration of the agreement that the plaintiff was not to engage in the same business of ginning or buying cotton seed and seed cotton south of Bear Skin Creek. The agreement sought to be enforced is clearly a division of the territory named, with the creek for a boundary. The sole object is to eliminate competition between the parties. This is an illegal purpose and the judge properly refused an injunction to the hearing. It is to the interest of the public that there should be the freest competition in a matter of this kind, and a contract to suppress it cannot invoke the aid of the equitable jurisdiction of the court.

One of the oldest and best-settled principles of the common law was that bonds in restraint of trade were illegal. This was held as early as 2 Henry V. (A. D. 1415), and it was then stated in the Year-books to be old and settled law. There was a modification of this rule (*Broad v. Jolyffe,* Cro. Jac., 506) that a contract not to use a certain trade in a particular place was a reasonable restriction and did not come under the general rule.

In *Kramer v. Old,* 119 N. C., 1, it was held that the sale of the vendor's milling business in Elizabeth City with stipulation against his remaining in the business was not invalid. The Court said: "The test of the reasonableness of the territorial limit covered by such contracts is involved in the question whether the area described in the contract is

greater than it is necessary to make in order to protect the purchaser from competition in his efforts to hold and get the full benefit of the business or right of competition bought by him."

In *Shute v. Heath,* 131 N. C., 281, the Court held: "A provision in a contract of sale of the business of manufacturing lumber and ginning cotton, that the seller would not engage in the same business in any territory in which the seller had secured patronage, is void for indefiniteness as to territory."

The present contract is not void upon that ground, but because it appears upon the face of it that the division of the territory is not for the purpose of conveying to the defendant the right to obtain all the patronage of the establishment which the plaintiff sold to the defendants, but for the purpose of shutting off competition by preventing the defendant from putting up any other plant or being interested in the establishment of any other plant within all that part of the county of Union north of Bear Skin Creek. This is clearly against public interest, which is that these ginning plants shall be multiplied according to the needs of the public, and shall not be restricted in number by agreement between parties in that line of business.

This Court has upheld the theory of a limited and reasonable restraint of trade in several cases, *i. e.*, as to sales of stock and livery business, *Anders v. Gardner,* 151 N. C., 604; *King v. Fountain,* 126 N. C., 197; as to the milling business, *Kramer v. Old,* 119 N. C., 6; newspaper business, *Cowan v. Fairbrother,* 118 N. C., 406; saloon business, *Jolly v. Brady,* 127 N. C., 142; medical practice, *Hauser v. Harding,* 126 N. C., 295; drug business, *Baker v. Gordon,* 86 N. C., 116.

In each of these cases the action was brought by the vendee in order to protect the good-will which had been conveyed as an essential element of the business which he had bought.

Even in such cases, the test is the reasonableness and *bona fides* of the contract in question, whether it is for the purpose of securing to the purchaser merely the benefit of the good-will of the business sold or whether it is partly at least for the purpose of suppressing competition. Consequently, such contracts must be considered as to their reasonableness in duration of time or extent of territory largely in connection with the nature of the business. A restriction as to territory which would be reasonable in regard to issuing a newspaper which draws from a large territory would not apply to the prohibition of the erection of ginning plants, in which business it is burdensome to the public to haul seed cotton any great distance to be ginned.

It appears in this case that J. R. Shute and J. T. Shute ginned at least 80 per cent of the cotton ginned in Monroe. From the nature of the business and of the commodities handled, the public had a material

interest in the subject-matter of this agreement, and the suppression of all competition with respect to 80 per cent of all the cotton ginned and opportunities for buying and selling seed cotton and cotton seed in the chief town of one of the largest cotton producing counties of the State necessarily operated against the public interest and convenience. The prohibition on the respective parties to erect any new ginning plant, or to be interested in the same, or in buying cotton seed or seed cotton in all that part of Union County lying north or south, respectively, of Bear Skin Creek was calculated and intended to prevent competition in that business. Still more so was this attempted restriction on the vendee, which could not protect the good-will of the business bought by him. Not only was the territory unnecessarily large for the protection of the buyer against competition by the vendor of the plant, but the period of ten years was also excessive for such purpose.

While there have been many decisions under the common law in regard to contracts in restraint of trade, the first statutory enactment in this State was chapters 218 and 219, Laws 1907, against agreements and combinations to "fix prices," and authorized the Attorney-General to prosecute and procure evidence. In 1909, ch. 448, these two acts of 1907 were somewhat broadened and additional authority given the Attorney-General for the enforcement of the law, but the statute applied still only to price fixing. By chapter 16, Laws 1911, the above Acts of 1907 and 1909 were repealed, and there was enacted a prohibition of agreements, combinations, or conspiracies "not to buy or sell within certain territorial limits with the intention of preventing competition." In 1913, chapter 41, this act of 1911 was substantially reënacted and its scope enlarged. Since then there has been no further amendment to the "Anti-trust Law."

The act of 1913 made every contract in restraint of trade (as there defined) illegal, and every person or corporation who directly or indirectly took part in such agreement indictable, and every contract in restraint of trade or commerce which was illegal under the principles of the common law was made a violation of this statute. The act further provided that all contracts in restraint of trade are illegal unless the parties can show affirmatively that the contracts did not injure the business of any contractor *or prevent any one from becoming a competitor.* This Court, referring to section 5, subsection b, said: "A contract made in violation of the terms of this subsection will not be enforced in the courts of this State." *Fashion Co. v. Grant,* 165 N. C., 453. The same is true, of course, of subsection f, of the same section 5, when, as in this case, the contract is unreasonable.

The plaintiff has heretofore obtained a permanent injunction against the defendant J. T. Shute erecting a gin plant on the lot near railroad

station in Monroe, where formerly stood the gin plant which he bought and agreed to move, and did remove. Whatever the scope or the legal correctness of that judgment (if it had been appealed from), it is not an estoppel on the defendant, for if it covered the same subject-matter, the remedy would be by enforcement of that judgment and not by a new action. Besides, the present locality is not the same.

Upon its face, the real intention of this contract was to remove competition and was in violation of the common law and of the statutory provisions against unreasonable restraint of trade. The court below properly refused the aid of the equitable jurisdiction of the court for its enforcement.

Affirmed.

J. C. SMITH v. COMMISSIONERS OF LEXINGTON.

(Filed 20 November, 1918.)

1. **Evidence—Principal and Agent—Employment.**

Where the defendant is sued for damages for its alleged negligence in installing an electric equipment in a building, etc., causing the death of the plaintiff's intestate, testimony of plaintiff's witness as to work done by him when not in the defendant's employment, and after the injury, is properly excluded.

2. **Courts—Expression of Opinion—Statutes—Electricity.**

Where an excessive voltage of electricity on the defendant's wire is in question on the trial for the negligent killing of plaintiff's intestate, and an expert witness has been asked the amount of the voltage that caused the death, a remark of the judge that the witness could state the voltage that would produce death is not objectionable as an expression of opinion prohibited by the statute.

3. **Appeal and Error—Objections and Exceptions—Courts—Expression of Opinion—Statutes.**

Objection that a remark made by the judge to the jury during the trial was an expression of his opinion, prohibited by the statute, should be taken at the time the remark was made.

4. **Evidence—Expert Opinion—Questions for Jury—Electricity.**

Where the plaintiff's intestate is alleged to have been negligently killed by a voltage of electricity coming through the defendant's wire, upon an equipment it had installed, the amount of voltage upon the wire at the time, taking into consideration the surroundings of the intestate, the condition of the room in which he was killed, etc., is for the determination of the jury, and the opinion of an expert witness thereon is properly excluded.

5. **Evidence—Opinion—Experts—Hypothetical Questions.**

The opinion of an expert must be upon a hypothetical state of facts, if found by the jury upon the evidence.

6. Evidence—Expert Opinions—Questions for Jury.

Where the plaintiff's intestate has been killed by a voltage of electricity which he received when taking hold of an electric socket that had been put in the building for his employer by the defendant, as a part of an electrical equipment, for which the defendant furnished electricity, and the question has arisen on the trial, as to whether a porcelain or metal socket should have been used under the conditions the plaintiff claims to have existed at the time, the opinion as to the kind that should have been used is properly excluded as being upon a question for the sole determination of the jury.

7. Evidence—New Matter—Court's Discretion—Appeal and Error.

The admission of new matter on redirect examination is within the sound legal discretion of the trial judge, and not reviewable on appeal, in the absence of its abuse.

8. Appeal and Error—Objections and Exceptions—Evidence.

Exceptions to the admission of evidence that has already been substantially given by the witness will not be sustained on appeal.

9. Appeal and Error—Evidence—Unanswered Questions.

Error assigned to the exclusion of unanswered questions, without making it to appear what these answers would have been, will not be considered on appeal.

10. Electricity—Negligence—Evidence—Approved Appliances—General Use.

The defendant had installed an electrical equipment in the building of the employer of the plaintiff's intestate, who was killed by a current of electricity furnished by the defendant, while taking hold of an electric socket therein; and upon the question whether the socket furnished was a proper one, a charge to the jury upon the evidence, that the defendant was required to furnish sockets such as were "approved and in general use and reasonably adapted for the purpose to which they were put," is *Held* to be a proper one.

11. Electricity — Negligence — Evidence — Questions for Jury—Appeal and Error.

Where the defendant has installed an electrical equipment in the house of the employer of the plaintiff's intestate, which has been accepted by the employer, and the intestate was killed by catching hold of a socket, and there is evidence tending to show that the socket was a proper one and was safely used immediately preceding the injury, and the death could only have been caused by unusual or accidental occurrences: *Held*, the burden of proof was on the plaintiff to show the defendant's actionable negligence, and a verdict in favor of the defendant on the issue, under a proper charge, applying the rule of the "highest degree of care practicable," as to the installation and inspection of the defendant furnishing the current, will not be disturbed on appeal.

WALKER and HOKE, JJ., dissenting.

APPEAL by plaintiff from *Shaw, J.*, at July Term, 1918, of DAVIDSON. This was an action for the death of plaintiff's intestate by an electric

shock at the Chero-Cola plant at Lexington, N. C., on 25 June, 1917. Verdict and judgment for defendant. Appeal by plaintiff.

J. C. Bower and J. R. McRary for plaintiff.
Raper & Raper and Walser & Walser for defendant.

CLARK, C. J. The plaintiff's intestate was assisting in putting machinery in the Chero-Cola plant at Lexington for operation, it being a new plant, and at the time he was sitting on a large metal-covered machine waiting for a change to be made in a gas tube. In getting down from the machine he took hold of an electric socket, which had been put in by the defendant and which was hanging over his lap, to push it out of the way, and received the deadly current which instantly killed him. The electric power and light fixtures had been installed by the town of Lexington some ten days before. There had been practically no bottling done up to that time and the lights had been turned on for the first time less than an hour before the plaintiff's intestate was killed. There was a large machine—some 6 feet long, 6 feet high, and 4 feet wide—partially filled with water, known as the "soaker." The electric light was hung over the soaker, and there was no practicable way to get to the socket except by getting on the machine or of standing on the floor on tiptoe and reaching the socket by leaning against the soaker. There was evidence that the voltage was about 220, which could have been on the droplight and socket at the time of the death, even if there had been no cement or damp floor, which was shown in the evidence. There was evidence that the Chero-Cola Company asked defendant to put in a current of 110 volts, and it protested against any higher voltage. The plaintiff put on evidence that this protest was not because of danger anticipated, but because so heavy a voltage burned out the lights too rapidly.

The plaintiff alleged three causes of negligence:

(1) That the use of a defective and unsafe socket with defective insulation.

(2) That the defendant negligently failed to furnish a lower and safe voltage after demand.

(3) That the defendant, through a defective transformer and defective appliances, allowed an excessive, dangerous and high current to be used, which caused the death of the intestate.

The defendant denied the negligence, pleaded contributory negligence on the part of the intestate and *ultra vires*, in that the town exceeded its powers in putting in private power and lights.

The intestate was a son of the owner of the building, which he had used for a garage and which had been wired some years for lights and

power. At the time of his death, the intestate was an employee of the Chero-Cola Bottling Company, its manager was his brother, and the vice-president of the company his brother-in-law.

Some weeks before the death of the plaintiff's intestate and before the machinery for the bottling plant was placed, the bottling company induced the town to change the wiring of the building and directed where the lights were to be placed and their arrangement. The employees of the town furnished the wire, cords, rosettes, and sockets, and the bottling company accepted and paid for the work. The electric bulbs were purchased by the bottling company, which put them in itself. The building was wired for lights and power, for a current of 220 volts. The lamp at which the plaintiff's intestate was killed was placed under the direction of his employer, the Chero-Cola Company, one of them being this light over the front end of the soaker, and two or three feet above it, hanging from the ceiling and placed there for the use and the operation of the machine. There was a shaft over the soaker with a pulley, over which a belt ran. When this belt came off the employees would go up on the soaker and put on the belt. The manager of the Chero-Cola plant and another stood on the soaker just a few minutes before the intestate was killed, and the latter held up the light to help in putting the belt back on the pulley, and received no shock. It was in evidence that the intestate got up on the soaker to fix the belt and then sat down on the end of the soaker, and, taking hold of the lamp as he got up, received the current that killed him, by making a circuit.

The first assignment of error is that the court sustained the defendant's objection to a question put to the plaintiff's witness as to the work done by him while not in the employment of the town after the boy was killed. This cannot be sustained.

The second assignment of error is that when the same witness was asked, "In your opinion, what amount of voltage was probably the cause of his death?" the defendant objected, and the court said, "I think it would be competent to ask him what is the amount of voltage which would produce death? But as to the amount that was the cause of his death, how could he know the probable amount of the current?"

We do not think that this was any expression of the judge's opinion upon the facts, which is the ground assigned for the objection. Besides, this last exception was not taken at the time and could not be considered. If taken at the time, the court could have explained to the jury that he was not expressing any opinion as to the weight of the evidence. *Bloxham v. Timber Corporation*, 172 N. C., 37; *Harrison v. Dill*, 169 N. C., 542.

This witness was also asked if he had any opinion as to the amount

of voltage that did kill the intestate, to which he replied: "In my opinion, in this special case, taking into consideration the room as it shows there, there is nothing less than 500 to 800 that went through his body." On objection by defendant, this testimony was properly excluded. *Kerner v. R. R.,* 170 N. C., 94. This seems to have been the opinion of the witness from the evidence, taking into consideration the room and other surroundings. It was the province of the jury to pass upon the evidence and form a conclusion, and not for the witness. *Kerner v. R. R.,* 170 N. C., 94; *Gray v. R. R.,* 167 N. C., 433.

Assignments of error 4, 5, 6, and 7 were presented together and were all based upon the court excluding questions of the same nature, upon objection by the defendant. These questions were:

"Regardless of lights, what kind of a socket should be used on a 220 current in a building with a cement floor, as a bottling plant, where a metal soaker and other bodies are sitting?"

"Was the use of a brass socket over the soaker at the place, in your opinion, proper protection of human life?"

"What kind of a socket should have been used, under the circumstances, in the Chero-Cola Bottling Plant for the protection of human life?"

"In your opinion, would the use of a brass socket in the plant in which the intestate was killed having a cement floor, if the jury should so find, and the jury should further find that it was hung over a metal machine, or soaker, state, in your opinion, what kind of socket, whether metal or porcelain, or otherwise, should have been used in the protection of human life?"

These were properly excluded because the opinion of the expert upon a hypothetical state of facts was not asked for, but the witness was asked to give his own conclusion as to one of the very matters at issue before the jury and was asked to set his own standard as to what should be done.

The witness had testified that a porcelain socket was ordinarily used in bottling plants; that 220 volts were dangerous to human life; that the young man was killed by an excessive current, and the witness also explained to the jury in detail the construction of porcelain and brass sockets, and the difference between them, and how the current could be gotten from the brass socket. The court merely excluded the individual standard of the witness as to which kind of socket should have been used and his conclusion upon the facts from the evidence which was for the jury to find. *Kerner v. R. R.,* 170 N. C., 94.

Assignments of error 8 and 9 were to the exclusion of questions asked on redirect examination and not responsive to new matter brought out on cross-examination. This rested in the discretion of the trial judge,

and besides, it does not appear what the answer of the witness would have been.

Assignment of error 10 was to the exclusion of a question to the same witness: "Can you form an opinion satisfactory to yourself as to whether or not the brass socket introduced in evidence and exhibited to you is a sufficient or proper protection to use on a voltage of 220?" It seems that the witness had already substantially answered this question.

Assignments 11 and 12 were to the exclusion of questions asked on the second redirect examination about matters not referred to in the cross-examination, and it does not appear what the answers would have been.

Assignments 13, 14, 15, 16, and 17 are to the exclusion of questions on redirect examination not responsive to new matter in cross-examination, and there is no indication what the answers would have been.

Assignment 18 is to the exclusion of a question, but it does not appear what the answer would have been.

Assignment 19 was to the exclusion of a question as to matters not connected with the case, but as to general matters occurring long prior to the time this action accrued.

Assignments 20 and 21 are that the court limited the question as to sockets in general use by restricting the evidence to "in common, general and approved use," which was not erroneous.

Assignments 24, 25, 26, 27, and 28 are that the court in charging upon the liability of the defendant in furnishing the socket for the Chero-Cola Company told the jury that the defendant was required to furnish such sockets as were "approved and in general use and reasonably adapted for the purpose for which they were wanted." This seems to be a clear statement of the general rule.

The inside wiring was done and the sockets furnished by the town for the bottling company, which accepted and paid for them, and they became its property. The town owned the wires in the street, which it connected with the wires of the bottling company and furnished the current. The controversy in this case is over a brass socket inside the mill, the plaintiff contending that porcelain was the kind in general use, and the defendant contending that brass sockets were approved and in general use. The defendant, in furnishing the socket, is subject to the same rule that would apply to any contractor or other persons doing the work of inside wiring of the house. The witnesses say that a brass socket is safe for 220 voltage and is made for 250 voltage, and that the socket in this case was standard and such as is generally used. The plaintiff's expert witness, Milson, says that the only way the intestate could get the current was by taking hold of the socket between the key and globe. Hammell, another of the plaintiff's experts, said that to

get the current, one would have to take hold where the socket and lamp come together, and that if the bulb is not screwed on far enough the danger is increased. If this were the case, the negligence was not on the part of the defendant. The defendant town did not furnish the bulbs, which were bought by the bottling company and screwed in by them.

The defendant had nothing to do with the placing of the machinery in the bottling plant, nor was it liable for the moist condition of the cement floor, nor for the placing of the pulley and belt, or the belt coming off the pulley. The defendant could not have foreseen that the soaker would be used as a step-ladder to aid in keeping up the machinery or that its top would be used as a platform.

There was a key to the socket, and it was safe, according to all the witnesses, to take hold of the key or cord or bulb. There is no suggestion that the young man who was killed attempted to either turn on or to turn off the light. His brother, Stokes Smith, had gotten upon and off the soaker several times before the accident, and Mize had stood on the soaker and held the cord a few minutes before the accident. There was evidence that brass sockets were in approved and general use and adapted to the purpose, and that, in fact, they were safer and better adapted than porcelain, which becomes easily cracked, and this defect is not readily discoverable and often becomes dangerous.

In the charge as to negligence the court applied the rule of the "highest degree of care practicable," and also applied this degree to see that they were kept in good order, and there is no exception to the charge as to any negligence of the defendant as to its appliances or inspection of the lights of the Chero-Cola Company. The jury had the benefit of a very clear and full charge, in which the court gave all the instructions asked by the plaintiff, and we find no error in the charge or in the exceptions as to the evidence. There was evidence for the plaintiff, and this is not a new suit. The jury evidently found that the death of the deceased was caused by an accident—the unforeseen and unexpected conduct on the part of the deceased, who probably sat down in his wet clothes on the soaker, a metal box, on wet ground, and took hold of the lamp at the exact place to get the current forming the circuit that caused his death. The plaintiff's experts testify that this might have happened whether the voltage was 220 or 110, or even 46. The cause of the death may be obscure. It has not been demonstrated with a clearness that satisfied the jury that it was due to negligence on the part of the defendant, and the burden was upon the plaintiff to so satisfy them.

No error.

E. C. GRIFFIN AND H. B. MARSH v. B. T. BARRETT.

(Filed 20 November, 1918.)

1. **Venue— Title to Lands— Exchange of Lands— "Boot"— Pecuniary Considerations—Transfer of Causes—Removal of Causes.**

Where the parties have agreed to an exchange of land, and that plaintiff should be paid in addition a certain price per acre for all of his lands lying beyond a defined line thereon, and accordingly a survey has been made, deeds given, and the "boot" paid in money, an action to recover the price for a greater acreage than that ascertained by the surveyor, upon allegation of mutual mistake induced by his error in making the calculation, is not one involving the title to land, which should be brought in the county where the land is situated.

2. **Appeal and Error—Venue—Objections and Exceptions—Title—Removal of Causes—Transfer of Causes—Motions.**

An appeal directly lies from the refusal of the trial judge to grant a motion to remove an action involving title to land to the county in which the land is situated. As to whether the right will be preserved by exception alone, *Quære?*

3. **Deeds and Conveyances— Equity— Mutual Mistake— Surveyor—Error— Judgments — Estoppel — Evidence — Nonsuit — Questions for Jury — Trials.**

Where the plaintiff sues to recover the balance of a certain agreed price for the surplus of his acreage in an exchange of lands according to the contract made, and there is evidence tending to show that the deeds given by the parties were induced by their mutual mistake, caused by the error of the surveyor in his calculations, the plaintiff's deed will not estop him from recovering under the contract entered upon. The evidence in this case is held sufficient to take the case to the jury.

APPEAL by defendant from *Harding, J.*, at May Term, 1918, of UNION.

F. W. Ashcraft and Stack & Parker for plaintiffs.
Redwine & Sikes and Stewart & McRae for defendant.

CLARK, C. J. This is an action to recover the balance, or "boot money," due on a contract for the exchange of lands. By the written agreement between the parties 30 October, 1911, the plaintiffs were to convey to the defendant all of their "Bost" tract of land lying north of an agreed line in Cabarrus County, in exchange for which the defendant was to convey to the plaintiffs a certain tract of land in Anson County containing 420 acres, with a provision that if the acreage of the said "Bost" tract of land north of the agreed line should exceed 225 acres, then the defendant was to pay the plaintiff $35 per acre for such excess. Thereafter a survey was made, and the plaintiffs executed a deed to the defendant for said land, and the defendant conveyed to them his Anson

County tract and paying the plaintiffs for excess acreage on the basis of the tract north of the agreed line containing 270½ acres. The plaintiffs allege that as a matter of fact the said tract contained 287.17 acres. The plaintiffs further allege that the settlement on the basis of 270½ acres was made by the mutual mistake of the parties, caused by the mistake of the surveyor. The jury found that there was a mistake as to the acreage caused by the mistake of the surveyor, and thereupon the judge directed a resurvey and appointed a referee to hear the evidence and to find from the survey and the evidence the true acreage. To this order there was no exception. The referee's report finds that the true acreage in the tract of land above the agreed division line was 287.17 acres. The court overruled the exceptions to the referee's report and entered judgment for the excess, 16.67 acres, and adjudged that the plaintiffs should recover therefor at the rate of $35 per acre, with interest from 3 November, 1914, when the mistake was discovered and demand made for the unpaid balance on the purchase money.

The first exception is that the motion to remove the cause to Cabarrus was denied. This cannot be sustained. The title to land is not raised by the pleadings nor the evidence. It is simply a question whether under the contract the defendant owes more purchase money than he has paid.

Had there been an issue as to title, the defendant could have appealed at once from a refusal of the motion to remove. *Cedar Works v. Lumber Co.,* 161 N. C., 603. Whether he would have waived his right to appeal on that ground by merely entering an exception without appealing at the time we need not decide. The test whether the question of venue arose was whether the title to land would be affected by this action. *Eames v. Armstrong,* 136 N. C., 393. Whether the plaintiffs had lost or gained this action, the title to the land would not have been affected, for the contract is in evidence and the boundaries of the land are not in dispute.

We do not think the exceptions to the evidence require discussion. There was no error in refusing the motion to nonsuit. The evidence established that the contract was executed as alleged. It was practically uncontradicted that the settlement was made on the basis of 270½ acres; that both parties relied upon Witmore's survey and calculation; and the jury find upon competent evidence that there was a mistake, and the survey made by order of the court, as found by the referee and affirmed by the court, shows that there were 16.67 acres underestimate for which payment has not been made, and for which the plaintiffs under the contract are now entitled to recover at the rate of $35 per acre, according to the terms of the contract.

The former settlement is not an estoppel, for the jury finds that there

was a mistake by the surveyor which misled both parties, and there being such mutual mistake, the plaintiffs are entitled to recover the true amount due under the contract. *Peacock v. Barnes,* 139 N. C., 197. It is true that in the sale of real estate, otherwise than by judicial decree, there is no implied warranty either as to quantity, title, or encumbrance; but in this instance there was an exchange of land with an agreement by defendant to pay for the number of acres above 225 acres at $35 per acre, and there being a mutual mistake as to the quantity, the vendor who was not in laches is entitled to recover for the quantity left out of the settlement.

The court charged the jury that if they found there was a mistake they must further find that it was a mutual mistake of both parties, and that the plaintiff must show by clear, cogent, and convincing testimony that there was such mistake. The defendant cannot complain of this instruction, which would apply rather to proving a mistake in the contract than to a mistake in settlement of the amount due.

There are several other exceptions which the defendant abandons by citing no authority and urging no reason to sustain them; and there were still other exceptions which the defendant has abandoned by not naming them in his brief. *Horton v. R. R.,* 175 N. C., 472. The plaintiffs should reform their deed to recite the courses and distances in the last survey.

No error.

G. W. FERRELL AND MARY J. FERRELL v. ORMAND MINING COMPANY.

(Filed 20 November, 1918.)

1. Landlord and Tenant—Contracts—Statute of Frauds—Parol Contracts—Improvements—Equity—Statutes.

The lessor may terminate a parol lease of land to "continue so long as the lessee may pay the agreed rent," because the statute, Revisal, sec. 916, requires leases of this character to be in writing, but a further agreement to allow the lessee to remove improvements he has placed thereon, or compensate him therefor, is not an interest in lands coming within the meaning of the statute of frauds, and upon the lessor's terminating the agreement he must compensate the lessor therefor to the extent the improvements have enhanced the value of the land, both under the terms of the parol agreement and under the equitable principle, that, having acquiesced in and received the benefit of the agreement, he must pay therefor. The doctrine of betterments, under Revisal, sec. 652, has no application to the facts of this case.

2. Landlord and Tenant—Contracts—Improvements—Orchards.

Where a lessee of land, by parol agreement, may recover of his lessor the value of improvements to the extent they may have enhanced the

value of the leased land, the planting of a fruit orchard, coming within its terms, are to be regarded as improvements for which a recovery may be had.

3. Landlord and Tenant—Equity—Improvements—Vendor and Purchaser.

The principle permitting a vendee of land, under a parol contract, to recover as much of the purchase money as he may have paid the vendor, who repudiates the agreement, less a reasonable rent, thus placing the parties *in statu quo*, is applied to this case, wherein the lessor terminated a parol contract, invalid because not in writing, Revisal, sec. 976, whereunder the lessee was to receive compensation for the improvements he had put upon the land.

APPEAL by defendant from *Long, J.*, at April Term, 1918, of GASTON.

This action was brought to recover for improvements placed upon the land of defendant while holding under a lease whereby, as plaintiffs allege, they should have the use of such land for the life of the male plaintiff, with an agreement that the plaintiffs could construct buildings on said land or make other improvements with the right to remove the same, or that the defendant would pay the plaintiffs for all improvements on said land. This was denied by the defendant, and there was also a denial of the value of such improvements. The defendant terminated the lease. The jury responded to the issues that the lease was on the terms and conditions set out in the complaint as above stated, and that the increased value of the land, by reason of the permanent improvements put thereon by the plaintiffs and agreed to be paid for by the defendant, was $550. Judgment was entered for said amount and defendant appealed.

C. E. Whitney and Mangum & Woltz for plaintiffs.

S. J. Durham for defendant.

CLARK, C. J. We think the issues submitted were sufficient to present every phase of the controversy. The defendant earnestly pressed the objection that the alleged agreement by which the plaintiffs put up the buildings and put in the orchard was void because not in writing.

The allegation in the complaint is that on 1 August, 1908, the plaintiffs leased from the defendant the tract of land in question under an oral agreement by which the plaintiffs should hold it during the life of the male plaintiff; that he was to clear said land, to erect buildings or dwellings with barns and outhouses, and to improve the land by cultivating the same and planting fruit trees, and that in consideration of such work and improvements the defendant agreed that plaintiffs should remain on the lands so long as they might wish paying the usual rent for such crops from year to year, and that the defendant would permit plaintiffs to remove all buildings from said lands and other improve-

ments placed thereon by the plaintiffs, if they should desire to leave, or pay them such sum as they should be reasonably worth. This was denied by defendant, but the jury find upon the issues that the same was true, and that $550 was the value added to the land by reason of permanent improvements put thereon by plaintiffs, which were buildings and an orchard.

If the contract had been in writing the defendant could not have evicted the plaintiffs; but the lease not being in writing when on 15 December, 1915, the defendant gave them notice that they could not use the land during the year 1916, the plaintiffs were thereupon entitled, under the agreement and upon well-settled equitable principles, to be compensated for the value of such improvements to the extent of the enhanced value of the land by reason of said buildings and orchard. This right arises not only upon the terms of the contract of lease, but upon the equitable principle that having acquiesced in the occupation of the premises by the plaintiffs, and having accepted the benefit of such improvements, while the defendant could terminate the lease, the defendant must compensate the plaintiffs for the benefits put upon the land by their labor in reliance upon the verbal agreement, which the jury have found to be as stated by the plaintiffs.

A contract to convey land, or "any interest therein," or leases longer than three years, are void under the statute of frauds (Revisal, 976) unless in writing. But the agreement in this case, that the plaintiffs should be allowed to remove the betterments or they should be paid for the value thereof, is not a contract for any interest in land, and therefore is not invalid under the statute of frauds.

In a recent case, *Ballard v. Boyette,* 171 N. C., at p. 26, it is said: "Whatever may have been the ancient rule, it is now well settled by many decisions—from *Baker v. Carson,* 21 N. C., 381, in which there was a divided Court, but *Ruffin, C. J.,* and *Gaston, J.,* concurring, and *Albea v. Griffin,* 22 N. C., 9, by a unanimous Court, down to *Hedgepeth v. Rose,* 95 N. C., 41—that where the labor or money of a person has been expended in the permanent improvement or enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act."

In *Critcher v. Watson,* 146 N. C., 152, the Court said: "A landlord cannot be 'improved' into a liability for improvements put upon his

property by the tenant without authority. Nor can any one be held liable legally for a promise made without consideration; but here the betterment to the house was accepted at the time by the plaintiff, who promised to pay the $1.72 for it, as the jury find. He has lost nothing, but still has the consideration of better light for a large room, which before had no light except from the door."

This doctrine rests upon the same principle that when a vendor of land repudiates the contract because it is not in writing he must put the vendee *in statu quo* by returning so much of the purchase money as has been paid with an allowance for the enhanced value of the land by reason of improvements placed thereon in good faith by the vendee, subject, of course, to a reasonable rent. It is true that where a tenant for life, or for a term of years, voluntarily makes improvements on a leased estate he cannot without any contract or agreement recover against the owner for such improvements, for it is his own fault that he placed such betterments thereon, and besides, he could have removed any buildings he might place thereon before the termination of the lease. But here the lessee made the improvements under a contract, as the jury find, that such improvements would be paid for or removed at the option of the tenant, and the landlord violated the contract by taking possession with the improvements thereon.

The exception that the court allowed compensation for the enhanced value of the land by reason of the fruit trees put thereon by plaintiffs cannot be sustained. Planting a fruit orchard has been held to be an improvement of the land. 14 R. C. L., 15. The enhanced value of the land by reason of the orchard was assessed by the jury. The right of plaintiffs to recover does not depend upon Revisal, 652, giving betterments where one holds an estate under a *bona fide* belief that he has title thereto, but it arises upon the express contract in this case and the equitable right to recover for the benefits which the plaintiffs have placed upon the land upon faith in the contract with the defendant and his acquiescence therein that they would receive compensation therefor.

The defendant set up a counter-claim for unpaid rents, but the burden of that was upon the defendant, and the jury found in response to the issue that there was nothing due.

No error.

W. H. TILLOTSON, JR., v. L. A. CURRIN.

(Filed 20 November, 1918.)

1. Parent and Child—Seduction of Child—Rape of Child—Loss of Services—Measure of Damages—Mental Anguish.

The recovery of damages allowed the father against one who has debauched his daughter grows out of the relationship of master and servant for loss of services; but in the relationship of father, he may recover for mental suffering and anguish caused by his humiliation and sense of dishonor and for expenses incurred, and also punitive damages.

2. Parent and Child— Rape of Child— Seduction of Child— Age— Parties—Constitutional Law—Feigned Issues—Statutes.

Damages may be recovered by the father against one who has debauched his daughter under twenty-one years of age, but if over that age she must sue in her own right under the provisions of our Constitution abolishing feigned issues and our statute requiring that actions be brought by the real party in interest. Revisal, sec. 400.

3. Parent and Child—Rape of Child—Seduction of Child—Age—Burden of Proof—Trials.

The right of action of the father against one who has debauched his daughter depending upon whether or not she had reached the age of twenty-one, and also this fact being peculiarly within his own knowledge, the burden is on him to show that at the time in question she was under age.

4. Appeal and Error—Harmless Error—Rape of Child—Seduction of Child—Age.

Where it appears, in an action brought by the father to recover damages against one for debauching his daughter, that the case has been tried below upon the contentions only as to whether the daughter was twenty years of age at the time or only eighteen years, a charge of the court to the jury erroneously placing upon the defendant the burden of showing the woman's age is harmless and will not entitle the defendant to a new trial.

5. Parent and Child—Seduction of Child—Rape—Force—Loss of Services—Actions.

It is not necessary to the father's action against one who has debauched his daughter under the age of twenty-one that the intercourse should have been induced by the defendant's solicitation, force being in aggravation of the damages allowed; and upon the birth of a child in consequence, the loss of her services will be presumed.

6. Evidence—Character—Particular Acts.

Evidence as to particular acts of misconduct is properly excluded on the question of the general character of a party to the action; in this case, whether the plaintiff in an action for damages for debauching his daughter had the reputation of selling whiskey in violation of law.

7. Appeal and Error—Excluded Answers—Prejudice.

It must be shown on appeal that excluded answers to questions were prejudicial in order to constitute reversible error.

8. Courts—Supreme Court—Newly Discovered Evidence—Motions Denied—Opinions.

Motions made for a new trial in the Supreme Court upon insufficient newly discovered evidence will be denied without giving an opinion.

APPEAL by defendant from *Bond, J.*, at the April Term, 1918, of GRANVILLE.

This is an action brought by the father to recover damages for the seduction of his daughter. The evidence of the plaintiff tended to prove that the intercourse with the daughter was brought about by force, and that the daughter was under twenty-one years of age. The defendant denied that he had intercourse with the daughter. The daughter has given birth to a child, and she testified the defendant was its father. At the conclusion of the evidence the defendant moved for judgment of nonsuit upon the ground that the father could not maintain an action for intercourse with the daughter produced by force. Motion overruled and the defendant excepted.

The court charged the jury, among other things, as follows: "The plaintiff alleges that the girl was about nineteen years of age; the defendant contends you ought to find she is older than nineteen. The burden is on the defendant to show by greater weight of evidence that she was older than she is represented by plaintiff to have been, and you will answer that issue according as you find the facts to be from the evidence in the cause, the burden to show her age to be in excess of nineteen being upon the defendant by the greater weight of the evidence."

The defendant excepted.

There were several exceptions to evidence, which will be referred to in the opinion.

The jury returned the following verdict:

1. Did the defendant, Lucius A. Currin, seduce and debauch plaintiff's daughter, as alleged in the complaint? Answer: "Yes."

2. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: "$4,129.16⅔."

3. What damage, if any, has defendant Currin sustained by reason of the wrongful arrest under process issued in this cause? Answer: .....

4. How old was Tessie Tillotson at the time the child referred to was begotten? Answer: "Eighteen years."

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

B. S. Royster, D. G. Brummitt, and F. W. Hancock, Jr., for plaintiff.

Hicks & Stem, T. Lanier, T. T. Hicks, and V. S. Bryant for defendant.

ALLEN, J. The right of the father to recover for debauching his daughter is based upon the loss of services growing out of the relation of master and servant, which, as said by *Nash, J.*, in *Briggs v. Evans,* 27 N. C., 20, is "a figment of the law to open to him the door for the redress of his injury," but is, however, "the substratum on which the action is built." If the daughter is under twenty-one years of age, the loss of services is presumed and no evidence of the fact need be offered; and if over twenty-one, the slightest service, such as handing a cup of tea, milking a cow, is sufficient at common law to support the action (*Snider v. Newell,* 132 N. C., 614); but while the father "comes into court as a master, he goes before the jury as a father" (*Briggs v. Evans, supra*), and may recover damages for his humiliation, loss of the society of his daughter, and mental suffering and anguish, destruction of his household, sense of dishonor, as well as expenses incurred and for loss of services, and the jury may also award exemplary damages as a punishment. *Williford v. Bailey,* 132 N. C., 404.

If, then, the action is founded on the relation of master and servant and the loss of service resulting from the unlawful intercourse, why should not the action be maintained when these facts are proven, whether the intercourse is induced by solicitation or force? And we have present here the relation of parent and child, which, for the purpose of the action, is the equivalent of master and servant, proof of the intercourse, and that the daughter was a minor, and of the birth of a child, from which loss of service is presumed.

We have no case in our Reports directly presenting the question as to the effect upon the right of action of procuring the intercourse by force, but the authorities elsewhere fully sustain the position of the plaintiff, and the principle is involved in the statement of *Pearson, J.*, in *McAuley v. Birkhead,* 35 N. C., 30, that "The gravamen of the action is that the defendant had connection with the plaintiff's daughter, who was sixteen years of age, and a member of his household, and in contemplation of law his servant, whereby she became pregnant and was delivered of a child, by reason of which he lost her services. The plaintiff having proven these allegations made out his case and was entitled to damages to some amount."

The author says in 35 Cyc., 1296: "Neither the element of force nor the fact that the female was unconscious at the time of the sexual intercourse will defeat the action, and it has been held that in an action by a woman for her own seduction force may be shown in aggravation of the injury." The cases of *Marshall v. Taylor,* 98 Cal., 55; *Kennedy v. Shaw,* 110 Mass., 147, and *Velthouse v. Alderink,* 153 Mich., 217, are cited in support of the text, and to these may be added *Furman v. Applegate,* 23 N. J. L., 28; *White v. Murtland,* 20 A. R., 100; *Dorman v.*

Moore, 5 Lans., 454; *Wooten v. Geissen,* 9 La. Ann., 523; *Leucker v. Steileu,* 31 A. R., 104; *Leucker v. Steileu,* 89 Ill., 545.

The Court says in the case from California: "Where a parent sued for the seduction of his daughter and consequent loss of services, and it appears that the intercourse was accomplished by force, such a showing will not defeat the action, but will aggravate the injury."

In the case from Massachusetts: "As the gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie although trespass *vi et armis* might have been sustained. It would be no defense that the crime was rape and not seduction."

And in the Illinois case: "We do not think there is any legal foundation for the claim that defendant could be held to less responsibility for forcible wrong than for seduction without force. The outrage is quite as great and the mischief quite as offensive."

We are, therefore, of opinion on reason and authority, that the evidence of force would not justify the denial of the right to maintain the action, and that the motion for judgment of nonsuit was properly overruled.

The exception to the charge presents the question as to the burden of proof to show the age of the daughter, the plaintiff contending that the defendant is required to prove that she was twenty-one years of age or more, and the defendant that the duty is imposed on the plaintiff to prove that she was under that age, and his Honor holding that the burden was on the defendant. It will be noted we have said the father could maintain the action at common law, although his daughter was of age, but the rule is different under our Constitution, which abolishes "feigned issues," and under our Code, which requires actions to be brought by the real party in interest.

"The section 177 (now Revisal, sec. 400) having provided that an action should be brought by the real party in interest, it should be beyond controversy that where an action is for seduction of a woman of full age, she, and not the father, is the proper one to bring the action. . . . The plaintiff (in that action the woman) being of age is the real party in interest. She is the only one who now could maintain the action. The father certainly cannot." *Hood v. Sudderth,* 111 N. C., 220, approved in *Scarlett v. Norwood,* 115 N. C., 285; *Willeford v. Bailey,* 132 N. C., 404; *Snider v. Newell,* 132 N. C., 614.

If this is a correct statement of the law as it is in this State, the father has no right of action unless his daughter is under twenty-one years of age, and it is essential to the maintenance of his action that

he prove and establish her minority, and the burden of proof must, therefore, be on him to establish the fact that his daughter is under age, without which he cannot maintain his action.

It is also well established "that when a particular fact necessary to be proved rests peculiarly within the knowledge of a party, upon him rests the burden of proof" (*Mitchell v. R. R.,* 124 N. C., 236, approved in *Walker v. Carpenter,* 144 N. C., 681), a principle which may be properly applied as between a father, who ought to know the age of his child, and a stranger.

We therefore conclude that the charge as to the burden of proof is erroneous, and for this error would order a new trial if it was material, harmful or prejudicial; but while there is very slight evidence that the daughter was twenty-one at the time of the seduction, the defendant did not rely upon this evidence and made no contention she was more than twenty, and if under twenty-one, the right of action was as complete in the father at twenty as at eighteen years of age.

"Instructions to the jury are to be considered with reference to the theory upon which the case is tried, and with reference to the evidence and contentions of the parties." *Cotton v. Mfg. Co.,* 142 N. C., 531.

His Honor charged the jury, without objection, as follows: "Defendant contends that you ought to find from the evidence in this case that she was twenty-one this last birthday (February) and twenty at the time of this occurrence. Plaintiff contends you ought to find she was eighteen, and defendant contends you ought to find she was twenty. Defendant contends they have tried to deceive you about that, and that was to make it appear she was younger than she really was. Defendant contends they brought statistics, one taken by the school census; that it was taken by a public officer in the discharge of a public duty, and contained entries made when no one had a motive for misrepresenting them, and, according to evidence, obtained information from family of the plaintiff which would make her twenty years old at time this occurrence took place. Defendant contends they offered statistics from Washington City, which they contend were taken by a public officer in the discharge of his duty at two different times, when no one misrepresented the facts, and those papers show her age was given as being such which would make her twenty years old when this occurrence took place."

The exceptions to evidence relate to character and to specific acts of misconduct on the part of the plaintiff and his family.

The plaintiff introduced ten witnesses who testified that he was a man of good character, and that his daughter's character was good before the occurrence complained of.

The defendant proved a good character by twelve witnesses.

Defendant testified, without objection, that plaintiff had been for some time a maker and seller of whiskey, and gave several instances. He offered to testify to other instances in which plaintiff sold and handled whiskey, but on objection this was excluded, and defendant excepted.

Defendant's witness, J. B. Powell, testified, on redirect, after plaintiff had attempted to prove a good character by him, that plaintiff had the reputation for the last year or two of handling whiskey about town.

Defendant offered to testify that plaintiff's wife, who was in court, but did not go on the stand, frequently sold whiskey at her home and other places. This testimony was, on objection by plaintiff, excluded, and defendant excepted.

The evidence as to particular facts was properly excluded "for the reason that they do not necessarily tend to establish a general character; that they confuse the jury by raising collateral issues, and especially that a party is presumed to be ready to defend his own general reputation or that of his witnesses, but not to meet specified charges against either without notice." *Nixon v. McKinney,* 105 N. C., 28, and cases cited, *S. v. Holley,* 155 N. C., 485.

The defendant also introduced four witnesses, Newton, Lyon, Parrott, and Jenkins, and asked each if he knew the reputation of the plaintiff for selling whiskey, and, upon objection, the witness was not permitted to answer. It does not appear whether the answer of Newton, Lyon, or Parrott would have been "Yes" or "No," and as there is nothing in the record to show that the refusal of the court to permit these witnesses to answer was in any way prejudicial to the defendant, it cannot in any way be held reversible error. As to the witness Jenkins, the defendant stated that he expected the answer to the question to be "Yes," without indicating upon what the expectation rested, but however this may be, the witness answered the question and said, "I think his reputation was good until the last year or so. I have heard rumors against his character in the last two years that I would consider against him."

We have given careful consideration to the brief of the learned counsel for the defendant and to the contentions made upon the oral argument, but we cannot find that there is any error which entitles the defendant to a new trial. We have also examined and considered the motion for a new trial because of newly discovered evidence, and not finding sufficient ground in our opinion for granting the motion, it is denied without an opinion thereon, which is in accordance with our precedents.

No error.

JOHN RIDDLE ET ALS. v. ALFRED RIDDLE AND JOHN DAVIS.

(Filed 20 November. 1918.)

1. Partition—Heirs at Law—Denial of Title—Evidence of Title—Dower—Judgment Roll.

Where proceedings to partition lands of the deceased father are brought by his children and heirs at law, and one of them denies the title to have been in the father, but claims it adversely in himself, and the cause has been transferred and is being tried in the Superior Court, the judgment roll in the proceedings for dower theretofore terminated is competent as a *quasi* admission or evidence in contradiction of the adverse claim, when it therein appears that the widow alleged title in the deceased, which was not denied by the present adverse claimant, though a party to the proceedings.

2. Same—Adverse Possession.

Where in proceedings to partition lands among the children and heirs at law of the deceased father one of them denies the source of title and claims it adversely in himself, the judgment roll in the petition for dower alleging title in the deceased, and the widow's possession thereunder, is competent as evidence to show the character of the widow's possession, which may be tacked to the possession of her husband when sufficient with the other evidence of adverse possession to perfect the title in the heirs.

3. Evidence—Deeds and Conveyances—Lost Deeds—Notice.

Parol evidence of the contents of a lost deed in the chain of a controverted title is properly admitted when the proper notice to the adversary party has been given to produce it and the evidence shows that it was last in his possession.

4. Evidence—Adverse Possession—State's Grants.

Only the State's vacant and unappropriated lands are subject to entry, and where a party to an action involving title to lands claims that he held adversely at a certain date, evidence of a more recent entry of the lands in dispute is competent to contradict him.

5. Statutes—Presumptions—Title—Prospective Effect.

The statutory presumption of chapter 195, Laws 1917, that the disputed title to lands is out of the State unless the State is a party or the trial is of a protested entry, was effective, by the express terms of the statute, from 1 May, 1917, and has no application to this action theretofore commenced.

6. Limitation of Actions — Adverse Possession — State Title — Evidence — Nonsuit—Questions for Jury—Trials.

There being evidence of the adverse possession of a party to this action, involving the title to land, for more than thirty years, it is held sufficient to take the title out of the State and ripen his own title, and a motion for judgment as of nonsuit thereon was properly refused.

APPEAL by defendants from *Harding, J.*, at the February Term, 1918, of MOORE.

This is a proceeding for the partition of land, the plaintiffs claiming as the heirs of John Riddle. The defendant, Alfred Riddle, another heir of John Riddle, and John Davis, to whom Alfred had sold a part of the land, denied that John Riddle was the owner of the land at the time of his death, and pleaded sole seisin, and upon these issues the proceeding was tried in the Superior Court, it having been transferred by the clerk. It was not denied that the petitioners and Alfred Riddle were the heirs of John Riddle. The petitioners offered evidence of possession by John Riddle and of his widow under an allotment of dower.

The first exception of defendants is to the introduction of the judgment roll of the Superior Court of Moore County, in which the widow of John Riddle was the petitioner and the defendant Alfred Riddle and John Riddle's other children were parties defendant, and in which the widow alleged that John Riddle died seized of the 78 acres of land involved in this case (together with other lands), and asked for dower therein. The defendant Alfred Riddle filed no answer in the dower proceedings. Dower was allotted as prayed for and the widow remained in possession of the land in controversy.

The petitioners were permitted to offer evidence as to the contents of a deed made to the ancestor of the parties by one John McLeod. The only evidence as to the loss is the following testimony of Riley Riddle: "I saw a deed after the death of my father. I saw the deed at my father's house. Alfred got the deed out and showed it to me. I left the deed with Alfred. I have never seen it since."

The court found as a fact that plaintiffs gave due notice in writing to the defendants to produce the deed, and that defendants stated in court that they do not have it and have never had it. The defendants excepted. The petitioners also introduced a record showing that Alfred Riddle had entered the land in controversy under the entry laws, and the defendants excepted.

There was a motion for judgment of nonsuit, which was overruled, and the defendants excepted.

The jury returned a verdict in favor of the petitioners, and the defendants appealed from the judgment rendered thereon.

H. F. Seawell for petitioners.
Zeb V. Sanders and U. L. Spence for defendants.

ALLEN, J. There is authority for the position taken by the defendants that judgments do not ordinarily operate as estoppels between plaintiffs or defendants, usually having this effect only as between adversary parties, but it does not appear that the decree in the dower proceeding was relied on to estop the defendants from denying that John

Riddle was the owner of the land in controversy when he died, and clearly the evidence was competent as a *quasi* admission of Alfred Riddle, who was a party and who failed to answer the allegation that John Riddle died seized in fee of the land, and as contradicting his present claim of ownership by possession. It was also admissible to show the character of the possession by the widow in order that this might be tacked to the possession of the husband to perfect the title of the heir. *Atwell v. Shook,* 133 N. C., 387.

The parol evidence as to the contents of the lost deed was also properly admitted, as the petitioners had traced the deed to the possession of the defendant and had given him notice to produce it. 17 Cyc., 532; *Overman v. Clemmons,* 19 N. C., 192; *Murchison v. McLeod,* 47 N. C., 241.

The record of the entry was introduced after the defendant Riddle testified that he entered into possession of the land in 1879, and had held it, claiming it as his own, and was proper for the consideration of the jury as tending to contradict him, as only vacant and unappropriated lands can be entered.

The motion for judgment of nonsuit could not be sustained because the evidence of the petitioners tended to prove that John Riddle had held possession of the land adversely for more than thirty years, which, if believed, was sufficient to show title out of the State and to vest title in him.

John Riddle testified: "I know the land described in the complaint all my life. My father lived on it. He moved on it after I was married. My brother was not grown. He lived on it thirty or thirty-five years—until he died. He built houses on it and rented a part of the land to other parties."

There was other evidence that John Riddle held possession for more than twenty years, and that his widow continued in possession ten or twelve years after his death.

Chapter 195, Laws 1917, which provides that in all actions involving title, title shall be conclusively presumed to be out of the State unless the State is a party or it is the trial of a protested entry, has no application because this proceeding was commenced before 1 May, 1917.

No error.

JOE HUDSON, ADMINISTRATOR OF JAMES HUDSON, DECEASED, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 20 November, 1918.)

1. Negligence—Proximate Cause—Rule.

The rule that an injury must be the proximate cause of a negligent act of another to be actionable, or a cause that produces the result in continuance sequence, without which it would not have occurred, or which a man of ordinary prudence could have foreseen as probable under existing conditions, does not require that the particular injury complained of in the action should be foreseen, and it is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.

2. Railroads—Negligence—Evidence—Proximate Cause—Questions for Jury—Master and Servant—Employer and Employee.

In an action brought to recover damages of a railroad company for negligently causing the death of plaintiff's intestate there was evidence tending to show that in the course of his employment the intestate was carrying mail from one of defendant's trains to another, on parallel tracks, across an intervening track, as he was accustomed to do, at the time one of the trains was changing locomotives, and that the old engine, or the one to be left, was enveloped from the intestate's sight by steam from its cylinders, and that this engine, so obscured, backed upon the intestate, contrary to defendant's general order, without signal or warning, or lookout upon the rear of the engine, to warn pedestrians accustomed to pass there of its approach, which would have avoided the injury: *Held*, sufficient for the determination of the jury as to the defendant's negligence, including the question of proximate cause.

3. Negligence—Federal Employers' Liability Act—Assumption of Risks—Last Clear Chance.

An employee, under the Federal Employers' Liability Act, only assumes the risks of those defects or dangers that are so obvious that a person of ordinary prudence would have observed and appreciated them, and in applying the doctrine of the last clear chance, under both the State and Federal statutes, the negligence of the plaintiff must be presupposed; hence where the dangers are of such character as to be known only to the defendant, and the negligence producing the injury is that of the defendant, of which the intestate could not have reasonably been aware or have anticipated, the doctrine of the last clear chance is not involved.

4. Evidence—Negligence—Concurring Negligence—Nonsuit—Questions for Jury—Trials.

A motion of nonsuit should not be granted, especially where, as under the facts of this case, the contributory negligence of the plaintiff, if any, and that of the defendant concurred in producing the injury complained of in the action.

5. Appeal and Error—Evidence—Admissions—Trials.

The party introducing evidence cannot complain thereof because it was not what he expected, or was unfavorable to him.

6. Appeal and Error—Evidence—Admissions—Harmless Error.

Exceptions to evidence admitted on the trial which could not have appreciably affected the result of the verdict will not be held for reversible error on appeal.

7. Evidence—Motions to Strike Out—Depositions—Agreements—Trials.

Where the parties have agreed that depositions taken in the action should be opened and passed upon by the trial judge, a motion to strike out evidence as incompetent comes too late upon the trial, and not within the agreement made.

8. Railroads—Negligence—Contributory Negligence—Rules—Abrogation—Evidence.

Where there is evidence tending to show that plaintiff's intestate, an employee of defendant railroad company, was negligently killed in the course of his employment, as he was carrying mail from one train to another, by defendant's locomotive passing on an intervening parallel track, and a violation of the rules of the company prohibiting employees from so using this track is relied upon, to show contributory negligence, testimony that the agents of defendant knew of the continued violation of this rule is competent upon the question of whether the rule had been abrogated.

9. Evidence—Collective Facts—Opinions.

Where the negligence of defendant railroad relates to its failing to keep a proper lookout on its backing engine enveloped in its own steam, testimony of eye-witnesses as to whether the intestate could have been seen in time to have avoided the injury if the lookout had been properly placed on the engine is competent as an instantaneous conclusion of the mind derived from observation of a variety of facts presented to the senses at the same time.

10. Evidence—Objections and Exceptions—Motion to Strike Out Evidence—Appeal and Error.

Semble, the trial judge has no power to strike out, on motion, testimony which has previously been given, without objection, the statute requiring that exceptions to evidence must be taken at the time.

BROWN, J., dissenting.

APPEAL by defendant from *Harding, J.*, at the May Term, 1918, of UNION.

This is an action by Joe Hudson, administrator of James Hudson, deceased, to recover damages for the benefit of the minor children of his intestate, under the Federal Employers' Liability Act, on account of the negligent killing of said intestate by the defendant railway company.

Plaintiff's intestate, James Hudson, was a station porter of defendant at Monroe, and as such it was his duty to handle the mails and to transfer same, when necessary, from one train to another standing within the yard. He was engaged in this duty when he was struck and killed by an engine of defendant, which was backing in a crowded yard be-

tween two passenger trains and through a dense cloud of steam, without giving proper signals and without having a trainman on the rear to keep a lookout, as required by the rules of the company.

The tracks of defendant in the Monroe yard lie east and west, and all are north of the station. On the morning in question train No. 5 came in on track No. 1, or the track nearest the station. Train No. 29 was standing on track No. 3, the mail car of No. 29 being just a little to the west of the mail car of No. 5. The "fresh" engine to carry No. 5 out was standing on track No. 2, just "in the clear." When No. 5 came in the "old" engine was uncoupled and run down the main line—that is, west of where tracks Nos. 1 and 2 join. Then the "fresh" engine also ran down to a point west of the junction of tracks 1 and 2. Then both engines began backing towards the east, the "fresh" engine on track No. 1 to couple up with train No. 5, the "old" engine on track No. 2. As the engines came back the "fresh" engine was blowing clouds of steam out of its cylinder cocks. The "old" engine was a little to the west of the "fresh" engine, the rear end of the tender of the "old" engine being about midway of the "fresh" engine, and as a result of the escaping steam the "old" engine was obscured, and defendant admits in its answer that plaintiff's intestate could not have seen said engine.

After the "old" engine had been uncoupled from train No. 5 plaintiff's intestate was given a sack of mail at the south door of the mail car of No. 5, and was told to put same on No. 29. He went around the west end of the cars of train No. 5, and was going towards the mail car of train No. 29, crossing track No. 2 in a northwesterly direction, and had reached the north rail of track No. 2 when he was knocked down and killed by the "old" engine, which was backing on track No. 2 in the steam.

Plaintiff alleged that the defendant was guilty of negligence in backing the engine in a dense cloud of steam between two passenger trains in a crowded yard, when passengers and employees were likely to be crossing the tracks, and when intestate was accustomed to transfer the mail, also in failing to blow the whistle or ring the bell, or give other signal, and in failing to station a trainman on the rear of the tender, as required by the rules. Defendant admitted that the engine was backing between the two passenger trains. There was evidence that it was customary to transfer the mail from trains on track 3 before the trains on track 1 had pulled out, and that defendant had notice that not only was plaintiff's intestate likely to be transferring the mails, but that other employees and passengers were also likely to be passing between the trains. Defendant admitted that in this yard and between these trains the engine was backing in a cloud of steam, and that the engine backed through this steam without giving any signal with its whistle.

The fireman testified that he was ringing the bell with the cord, but a number of witnesses who were very near testified that they did not hear the bell ringing, and the engineer admitted that he was not using the automatic devise for ringing the bell with which the engine was provided. The defendant admitted that no trainman was stationed on the rear of the backing engine. Defendant's Rule U provides: "Cars will not be moved in front of engine, or engine moved backward, unless there is an employee on the front of the moving car or on the rear of the engine to keep a lookout in the direction the movement is being made, to avoid striking persons or obstruction on the track. Enginemen, as well as conductors, will be held responsible for violation of this rule."

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was overruled, and defendant excepted. The defendant also excepted to dividing the issue of damages. There are also other exceptions, which will be referred to in the opinion.

The jury returned the following verdict:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff's intestate by his own negligence contribute to his death, as alleged in the answer? Answer: "Yes."

3. Did the plaintiff's intestate by his own conduct assume the risk of being run over by defendant's engine and tender, as alleged in the answer? Answer: "No."

4. What damages, if any, is plaintiff entitled to recover for the infant Clarence Hudson, as alleged in the complaint? Answer: "$600."

5. What damages, if any, is the plaintiff entitled to recover for the infant Cora Hudson, as alleged in the complaint? Answer: "$800."

6. What damages, if any, is plaintiff entitled to recover for the infant Ruth Hudson, as alleged in the complaint? Answer: "$1,200."

Judgment was entered on the verdict in favor of the plaintiff, and defendant appealed.

T. F. Limerick, W. B. Love, and Stack & Parker for plaintiff.
Cansler & Cansler and Armfield & Vann for defendant.

ALLEN, J. The principal exception relied on, and one earnestly urged by the learned counsel for the defendant, is to the refusal to enter judgment of nonsuit, which rests upon the following grounds:

(1) That there is no evidence that the failure to ring the bell or blow the whistle, or to have a man on the tender of the backing train, was the proximate cause of the death of the intestate of the plaintiff.

(2) That there is no evidence that injury to the intestate could be reasonably foreseen or anticipated.

(3) That upon the uncontradicted evidence the intestate assumed the risk of his injury and death.

(4) That if there is any liability of the defendant, it is upon the doctrine of the "last clear chance," which is not applied in the Federal courts, and as this action has been tried under the Federal Employers' Liability Act the rule of the Federal courts must be applied.

In support of the first two positions, the defendant relies on the definition of proximate cause, in *Ramsbottom v. R. R.,* 138 N. C., 41, approved in *Bowers v. R. R.,* 144 N. C., 686, and in *Chancey v. R. R.,* 174 N. C., 333, as "A cause that produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed," to which we adhere, with the modification contained in *Drum v. Miller,* 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.

The language used is (135 N. C., 214): "When, therefore, a willful wrong is committed or a negligent act which produces injury, the wrongdoer is liable, provided, in the latter case, he could have foreseen that harm might follow as a natural and probable result of his act, for if he can presume that harm might naturally and probably follow he must necessarily intend that it should follow or he must have acted without caring whether it would or not, which, in effect, is the same thing. It may be stated as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to another, or when he does a legal act in such a careless or improper manner that he should foresee, in the light of attending circumstances, that injury to a third person may naturally and probably ensue, he is answerable in some form of action for all of the consequences which may directly and naturally result from his conduct. . . . In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed, and many authorities cited to support it, in 21 A. and E. Ency. Law (2d Ed.), p. 487: 'In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or

omission, or that consequences of a generally injurious nature might have been expected.' "

Backing a train without a lookout on the rear and without notice of its approach along a track which employees and others are accustomed to pass over is negligence (*Lassiter v. R. R.,* 133 N. C., 244; *Hammatt v. R. R.,* 157 N. C., 322; *Ray v. R. R.,* 141 N. C., 84; *Shepherd v. R. R.,* 163 N. C., 518); and under the evidence in this case it was for the jury to say whether this negligence was the real cause of the death of the intestate, and whether harm or injury to some one might be anticipated as the result of the wrongful and negligent act.

The jury were fully justified in finding that a lookout in an elevated position on the tender could have seen the intestate in time to warn him and prevent his stepping on the track, or that the ringing of the bell or sounding the whistle would have given notice of the approach of the train in time to avoid the injury, and that some injury might have been anticipated from backing a train, without protection, along a track much used, between two passenger trains on parallel tracks, through a cloud of steam.

The second and third grounds for the motion for judgment of nonsuit may be dealt with together, for while they rest on different legal principles, in the present case, they are dependent on the same facts and conditions.

The doctrine of the "last clear chance" presupposes the previous negligence of the plaintiff, and liability is imposed upon the idea that, notwithstanding this negligence, the defendant has the last opportunity of avoiding the injury, and an employee, under the Federal decisions, is held to assume the risk of those defects and dangers so obvious that a person of ordinary prudence would have observed and appreciated them. *Erie R. R. v. Purucker,* 244 U. S., 320.

These principles have no application here, and certainly they cannot be held to be determinative as matter of law, because the evidence and the findings of the jury show the concurrent negligence of the intestate and the defendant, and not the previous negligence of the plaintiff, and the last opportunity with the defendant to avoid injury; and the dangers, instead of being obvious, were unknown to the intestate, and he had no reason to anticipate them, caused, as they were, by the negligence of the defendant.

The case of *R. R. v. Koennecke,* 239 U. S., 252, is very much in point, and it also distinguishes *Aerkfetz v. Humphreys,* 145 U. S., 418, on which the defendant relies. In that case it appeared that plaintiff's intestate, while acting as a switchman in the defendant's yard, was run over and killed by a train which was backing without a trainman on the rear to keep a lookout and without giving signals of its approach, and the Court

said: "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard; that the movement was not a yard movement; that it was on the main track, and that there was no lookout on the end of the train and warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz v. Humphreys,* 145 U. S., 418 (36 L. Ed., 758; 12 Sup. Ct. Rep., 835), but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk."

In *Erie R. Co. v. Purucker,* 244 U. S., 320, Marietta, the injured person, was a section man in the employ of the defendant company. The manner of his injuries is there described in the language of *Mr. Justice Day:* "Early on the morning of the injury he started from his residence to report to the foreman accordingly. It appears that at and near the place of injury the company had a double track; that the north track is used for trains going west and the south track for trains going east; that the plaintiff, in going to the place designated, went upon the south track, and was walking eastwardly when a passenger train bound east came upon this track, and, to get out of the way of it, he stepped over upon the north or west-bound track; that while walking on that track he was struck and run over by an engine which was running backward and in the opposite direction from that in which the trains ordinarily ran upon the north track. This engine had been detached from a train of cars and, after pushing another train up a grade on the west-bound track, was returning to its own train at the time of the injury. Marietta testified that he had no warning and did not see the approaching engine, owing to steam and smoke from the passenger train, which had just passed upon the other track. The engineer and fireman of the backing engine testified that they did not see Marietta until after he was run over by the engine, and gave no signal or warning of its approach."

The Court sustained a recovery for plaintiff under the Employers' Liability Act, and in holding that there was no error in refusing a prayer on assumption of risk said: "Under such circumstances, the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it."

We are therefore of opinion the motion for judgment of nonsuit was properly overruled.

The plaintiff took the deposition of one Horton, and on cross-examination, in answer to a question by the defendant, he said it was not necessary for steam to escape from the cylinder cocks. There was no objection to the answer and no motion to strike it out. The deposition was returned, and it was agreed that it should be opened and passed on by the judge as though written exceptions had been filed before the clerk. At the trial, the defendant moved to strike out the answers of the witness, which was refused, and the defendant excepted.

The motion came too late after the trial commenced and was not properly within the agreement of the parties that the judge should pass upon the deposition as upon exceptions filed before the clerk. A party cannot except to evidence brought out by himself, nor can he, as of right, suppress an unfavorable answer when he expected a favorable one. Again, the answer could have no appreciable effect on the trial, as the escape of the steam was admitted by both parties, and it was relied on to show that the intestate could not see the approaching train, and not as an act of negligence.

There are certain exceptions based on the admission of testimony to the effect that it was customary for deceased to transfer mail from trains on track No. 1 to trains on track No. 3 before the trains on track No. 1 had pulled out, and that the agents of defendant knew of this custom and did not object to it. This evidence was offered in answer to the contention of defendant that plaintiff was guilty of contributory negligence in so transferring mail contrary to orders. This evidence was competent as tending to prove an abrogation of the rule which the defendant claimed the plaintiff had violated, and also for the purpose of showing that the defendant might reasonably expect employees to be on the track on which it was backing its train.

The defendant introduced the engineer, Shiver, in charge of the train on the parallel track, who testified, on cross-examination, as follows:

"Q. There was no reason why the man in charge of the other engine could not have seen Jim, was there? He could not have seen him because Jim was at the rear.

"Q. But if they had a man at the rear he could have seen him? Certainly."

No objection was made at the time question was asked and answered. Some time later in the trial defendant asked that his objection and exception to this question and answer be entered. The plaintiff objected, but the court overruled the objection of plaintiff and allowed the defendant's objection and exception to be entered.

Also the engineer, Garnett, in charge of the train which killed the deceased, who testified on cross-examination:

"If there had been a man on the rear of the tender I don't know whether he could have seen him or not.

"Q. You could see beyond the rear of the tender yourself, but you could not see Jim because the tender was in the way? A. Yes, sir. I couldn't see through the tender, and there was the steam too.

"Q. If there had been a man on the rear of the tender he could have seen Jim then?"

Objection by defendant; overruled; exception.

"Possibly he could; yes, sir."

The objection to the evidence of the witness Shiver might be disposed of upon the ground that exceptions to evidence must be taken *at the time*, and unless so taken, the objection is waived (*Taylor v. Plummer*, 105 N. C., 56; *Lowe v. Elliott*, 107 N. C., 718; *Alley v. Howell*, 141 N. C., 116); and as this is a requirement of the statute, his Honor had no right to suspend its operation; and to the evidence of Garnett, that it was too indefinite to affect the result, he having first said he did not know whether a man on the tender could have seen the intestate, and then possibly he could, and finally yes, but giving the objection full effect, the evidence is admissible as a short-hand statement of the fact—"the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." McKelvey Ev., 174.

The defendant also objected to dividing the issue of damages, but his Honor followed the course approved in *Horton v. R. R.*, 175 N. C., 474.

A discussion of the exceptions to the charge and to refusal to give certain special instructions would be of no practical benefit. We have examined them carefully and have compared the prayers with the charge given, and find no reversible error.

No error.

BROWN, J., dissenting: I concur in the opinion of the Court upon the first, second, and third issues. I dissent from the judgment of the Court upon the fourth, fifth, and sixth issues as to damage.

Three separate issues as to damage were submitted—one for each child of the deceased. If he had left a dozen children, then, under the ruling of the Court, a dozen issues as to damage would have been submitted, so the more children the deceased left the larger the recovery. I do not think this method of assessing damage is contemplated by the Act of Congress. The assessment should be in solid, based upon the earning power of the deceased, and one recovery allowed for all beneficiaries. The dissenting opinion of *Justice Walker* in *Horton v. R. R.*, 175 N. C., 488, leaves nothing to be said on the subject.

MAXTON AUTO COMPANY, INC., v. E. S. RUDD.

(Filed 27 November, 1918.)

1. Contracts — Repudiation — Consideration Retained — Estoppel in Pais — Vendor and Purchaser.

A party to a contract may not retain its benefits and repudiate its obligations and burdens, or retain advantages in the course of a business deal or negotiations, when he has renounced and refused to abide by its terms; the principle is based upon the doctrine of estoppel *in pais*, which, in its last analysis, rests upon principles of fraud. In such case it is not always necessary that the fraudulent purpose be present at the inception of the transaction, but at times may operate and become effective by reason of an unconscionable refusal to return the consideration or make such restitution as equity and good conscience require.

2. Mechanics' Liens—Possession—Checks—Payment Stopped—Cash Transactions—Repossession.

A mechanic ordinarily loses his right of lien upon an automobile for the price or value of repairs by surrendering possession to the owner; but where the possession is relinquished by him upon receiving a check for the amount, and drawer having stopped payment of the check, the transaction is upon a cash basis, and the owner may not retain possession of the automobile, so as to deprive the repairer of his mechanic's lien.

3. Sunday—Statutes—Bills and Notes—Checks—Mechanics' Liens.

Where a mechanic has repaired an automobile for its owner during the week, and delivered possession to him on Sunday on receipt of his check to cover his charges, the fact that the check was dated on Sunday does not render it invalid under our statute, Revisal, sec. 2836, or permit the owner to stop its payment and retain the car in his possession, so as to release it from the lien thereon for the amount of the repairs.

4. Costs—Statutes—Recovery.

Where the controversy is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in defendant's favor upon an issue of fraud, the question of taxing the cost does not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, he is entitled to recover the costs, under our statute, Revisal, sec. 1264 (2).

ACTION, tried before *Harding, J.*, and a jury, at April Term, 1918, of SCOTLAND.

The action was to recover a Franklin automobile for the purpose of enforcing a mechanic's lien thereon for repairs, under section 2017, Revisal. Plaintiff claimed, and offered evidence tending to show, that in August, 1916, plaintiff company had repairs done to automobile of defendant, purchasing new parts for same, etc., the bill amounting to $71.48, with protest fees for check given, $1.75, amounting to $73.33.

That defendant gave plaintiff his check for same on Bank of Laurinburg and was thereupon allowed to take possession of the property; that defendant, having thus obtained possession, stopped payment of said check, and plaintiff alleged, further, that this was done by defendant with the fraudulent view and purpose so to obtain the property, and thus deprive plaintiff of his lien, etc.

Defendant alleged, and offered evidence tending to show, that under the contract plaintiff was to put defendant's car in good shape; that the repairs to his machine were of no benefit to it; that he immediately had to have necessary repairs made to the extent of $42.41, and further, that while defendant's car was in care of plaintiff at its garage the tools and lap robe therein belonging to defendant were lost by reason of plaintiff's negligence, to defendant's damage, $29.75, and defendant, denying any and all liability on the claim, set up a counterclaim against plaintiff based on these averments and evidence, and, denying any and all fraudulent purpose, averred that he had stopped payment of check because he discovered on trial that plaintiff's pretended repairs had been without benefit, etc. Defendant having replevied the car, on issues submitted, the jury rendered the following verdict:

1. Is the defendant indebted to the plaintiff as alleged in the complaint, and if so, in what amount? Answer: "$73.23."

2. Is the plaintiff indebted to the defendant as alleged in the answer, and if so, in what amount? Answer: "$47.50."

3. Is the indebtedness by defendant to plaintiff a mechanic's lien upon the automobile referred to in the complaint? Answer: "Yes."

4. Did the defendant wrongfully and fraudulently obtain possession of the automobile from the plaintiff, as alleged? Answer: "No."

5. Does the defendant wrongfully withhold possession of the automobile from the plaintiff? Answer: "No."

6. What was the value of the automobile at the time it was replevied by the defendant? Answer: "$200."

The court being of opinion that, on the record and facts in evidence, the fifth issue should be answered "Yes" as a matter of law. Judgment for plaintiff, including costs of action, and defendant excepted and appealed.

No counsel for plaintiff.
Cox & Dunn for defendant.

HOKE, J. In general terms, it is said that a man may not assume and maintain inconsistent position to the prejudice of another's rights. He cannot retain the benefits of a contract and repudiate its obligations and burdens, nor can he hold to the advantages acquired in the course of a

business deal or negotiation, and by reason of it, when he has himself renounced and refused to abide by the terms. The position is usually referred to the doctrine of estoppel *in pais*, which rests, in its last analysis, on the principles of fraud, and it is not always necessary that the fraudulent purpose shall be present at the inception of the transaction, but the principle may at times operate and become effective by reason of an unconscionable refusal to return the consideration or make such restitution as equity and good conscience requires. *McCullers v. Cheatham*, 163 N. C., 61; *Smith v. Young*, 109 N. C., 224; 10 R. C. L., title, Estoppel, 688; Bigelow on Estoppel, 7441; 16 Cyc., 785, *et seq.*

Approving these general principles in *Smith v. Young, supra*, where one had sold another his cotton for cash, and the purchaser undertook to apply the proceeds to notes held by him against the vendor, and it was held that the latter had the right to disaffirm the sale and recover the full price of the cotton in an action for wrongful conversion, *Avery, J.*, delivering the opinion, said: "The defendants bought for cash and were bound to pay the money or return the cotton. A man cannot take property wrongfully and apply the value of it rightfully, even in discharge of a just debt due him from the owner." And so here, the plaintiff company, having repaired defendant's car, had a mechanic's lien thereon for the amount due. Revisal, sec. 2017. Construing the statute, our Court has held that the lien is lost by surrendering possession to the owner. *Black v. Dowd*, 120 N. C., 402; *McDougal v. Crapon*, 95 N. C., 292.

Defendant, in payment of the claim, gave plaintiff a check on the bank for the amount, importing a cash payment, and thereby plaintiff was induced to surrender the possession of the car. Defendant, believing that the repairs had been of no benefit, stopped payment of the check, but when he does so he must restore plaintiff's possession and put him in the position to enforce his mechanic's lien for the amount due. No doubt the defendant had no fraudulent purpose in giving the check, and the jury have found that there was no actual fraud, but having obtained possession of his car under a promise to pay cash, on refusal, he is estopped to resist enforcement of mechanic's lien by reason of the possession thus acquired.

It is contended for defendant that plaintiff is prevented from asserting his claim by the fact that the check was given and the car delivered to the owner on Sunday, and an exception is noted for refusal to submit an issue as to these facts. In our opinion, if this were established it would only tend to strengthen the plaintiff's position, but under our decisions construing section 2836 of Revisal, that which forbids the pursuit of one's ordinary calling on Sunday, the law is restricted to those acts and callings which have a tendency to interfere with the seemly

observance of the day, and so construed, it would not, on the facts of this record, invalidate the check or inhibit the delivery of the car on Sunday, the repairs to the car having been made in the working days of the week. *Rodman v. Robinson,* 134 N. C., 503; *Melvin v. Easley,* 52 N. C., 356.

It may be well here to note that the statute excepts works of necessity, etc., and would no doubt permit repairs to be made in a clear case of emergency.

It was further insisted for defendant that the issue chiefly debated between the parties, and that on which the larger part of the costs accrued, was the fourth, addressed to the question of actual fraud, and that defendant, having obtained the verdict on that issue, the costs of same should not be taxed against him. But the suit is to recover possession of the car to enable plaintiff to enforce a mechanic's lien for the amount due, and plaintiff having established his right of action for the purpose indicated the costs follow the recovery by express provision of the statute. Revisal, sec. 1264, subsec. 2.

There is no error, and judgment in plaintiff's favor is affirmed.

No error.

A. COLLINS LUMBER COMPANY, INC., v. KINGSDALE LUMBER COMPANY, INC.

(Filed 27 November, 1918.)

1. Instructions — Contracts — Breach — Appeal and Error— Objections and Exceptions.

In the purchaser's action to recover damages against the seller for breach of contract in failing to ship lumber in carload lots to several designated points, it appeared that the defendant accepted the order upon conditions, one of them being that if shipment could not be made "on account of embargoes to destination called for within something like ninety days, we shall be at liberty to sell the stock where it can be shipped, provided you are not in position to have it diverted to some other point to which it can be shipped." The cause was tried upon the question of whether the failure of the defendant to ship to the designated points was by reason of the embargoes. The judge properly charged the jury upon the law relating to this phase of the case, and the jury having answered the issue in defendant's favor, the plaintiff excepted that the charge was incomplete, upon the theory that the defendant should have notified the plaintiff of its failure to ship on account of embargoes: *Held,* the exception should have been on a tender and refusal of a proper prayer for instruction, and under the circumstances of this case, the proximity of the plaintiff, with available means of communication, etc., and the cause having been tried upon a different theory, no reversible error is found.

2. Instructions— Construed as a Whole— Erroneous in Part— Appeal and Error—Harmless Error.

Where the defendant denies liability for breach of contract to ship out lumber in carload lots to designated points, under a provision therein exempting it from liability if unable to ship on account of embargoes "called for something like ninety days," and with privilege in that event to ship it elsewhere, provided the purchaser was "not in position to have it diverted to some other point," etc., an instruction that the defendant would not be liable if plaintiff gave shipping instructions to points under embargo at the time, when standing alone, is erroneous, the contract requiring that the defendant's obligation to ship shall continue for at least ninety days; but construing the charge as a connected whole, as given in this case, it properly signifies and the jury must have readily understood that the obligation to ship was continuous for the stated period, and no reversible error is found.

3. Evidence—Records—Independent Knowledge—Appeal and Error.

Where records of a railroad company relating to shipments, or embargoes thereon, are relevant to the inquiry in an action upon contract between the users of the railroad, they are properly excluded from the evidence when the railroad agent, a witness by whom they are sought to be introduced, testifies he has no personal knowledge on the subject; and to make the records themselves competent, their authenticity must be sufficiently established (*Ins. Co. v. R. R.*, 138 N. C., 42); and upon appeal, it must be made to appear that the entries were relevant to the issue.

4. Evidence—Contracts—Commercial Rating—Irrelevancy.

Evidence of the commercial rating of the plaintiff, seeking to recover damages for the breach by defendant of its contract to make shipments of lumber, defended upon a provision of the contract exempting defendant from liability by reason of embargoes upon the shipment, is irrelevant to the inquiry, and properly excluded.

ACTION, tried before *Webb, J.*, and a jury, at October Term, 1918, of MECKLENBURG.

The action was to recover damages of defendant for alleged wrongful failure to ship six carloads of lumber from defendant's mills at Lumberton, N. C., pursuant to a contract between the parties. On denial of liability and issues submitted, there was verdict for defendant. Judgment; plaintiff excepted and appealed.

E. R. Preston, C. A. Duckworth, and Johnson & Johnson for plaintiffs.

McIntyre, Lawrence & Proctor for defendant.

HOKE, J. The facts in evidence tended to show that on 14 March, 1917, plaintiff, a lumber dealer with home office in Charlotte, N. C., ordered of defendant company, operating a mill at Lumberton, ten carloads of lumber of a specified kind, six to Buffalo, N. Y., and four to

Newark, N. J., f. o. b. cars Lumberton, N. C., four of the cars to Buffalo having been shipped pursuant to order and about which there was no dispute. In accepting this order by letter, of date 17th March, inst., defendant company closed the contract in terms as follows: "We enclose herewith acceptance of orders for ten cars 4 x 4 edge culls and red heart, one car cull flooring, and one car 5 x 4 edge culls and red heart. In accepting these orders, we would like to have it understood that we are not responsible for shipment except that the lumber called for develops from stock on our yard at present, as we are not going to cut any of this class of timber. Also, should we be unable to ship on account of embargoes to destinations called for within something like ninety days, we shall be at liberty to sell the stock where it can be shipped, provided you are not in position to have it diverted to some other point to which it can be shipped."

There was evidence on the part of plaintiff to the effect that six of these cars of lumber—two to Buffalo and four to Newark, N. J.—were never shipped, though defendant was urged and had full opportunity to do so, and had the material on his yard to comply with contract, and by reason of such failure plaintiff suffered substantial damages.

Defendant contended and offered evidence tending to show that Newark, N. J., one of the points designated in the order, was under an embargo as to this order during the entire life of the contract, and that having shipped four of the cars to Buffalo as requested further shipments to this point were also prohibited, entirely preventing defendant from shipping the remaining two cars; that no other points were designated by plaintiffs during the continuance of defendant's obligation, except one on 22 May, when plaintiff directed defendant to ship the four Newark cars to Washington, D. C., but by a route that was also under embargo, preventing the shipment.

On an issue as to breach of contract by defendant, the court, in effect, submitted the case to the jury on the question whether defendant could have made the shipments to the points designated at any time during the continuance of its obligation, and the jury have rendered a verdict that there was no breach by defendant, thus establishing that as to these cars there was an embargo existent against these points during the entire period covered by the contract.

On the argument, it was chiefly urged for error by appellant that in submitting the question of wrongful failure to ship in breach of the agreement the court failed to impose on the defendant the duty of notifying plaintiff that the points designated in the order were under embargo. We are inclined to the view that under the last clause of the letter of acceptance conditions might very well arise that would require notice by defendant as to the existence of an embargo, but the objection,

in our opinion, is not open to plaintiff on the present record for the reason that no harm could have come to plaintiff from defendant's failure to give notice. Living within 125 miles of defendant's mill, in daily communication both by mail and telephone, plaintiff could have readily ascertained the occasion for the delay. As a matter of fact, plaintiff admits having been notified as to Newark, and it is apparent from a perusal of the pleadings and facts in evidence that the issue between these parties was and was intended to be fought out on the question whether, during the life of the contract, the defendant could have shipped to the points designated by plaintiff. This being true, and the charge of the court being correct in itself and sufficient to cover the phase of the controversy as presented by the parties, if plaintiff desired further instructions as to defendant's failure to notify and the effect of it, he should have preferred requests to that effect. No doubt the reason for this was that the learned and capable counsel desired and intended to insist that defendant within the time could very well have shipped to the points designated, where plaintiff had made advantageous contracts of resale and did not care to weaken his main position by diverting side issues, but having taken this course, under our decisions apposite, it is not permissible to raise the question by exceptions noted to the charge after the trial "that the same is incomplete" in the respect suggested. *Penn v. Ins. Co.,* 160 N. C., 399; *Marcom v. R. R.*, 165 N. C., 259.

It was further objected that the court instructed the jury that "if plaintiff gave shipping instructions to defendant to ship to points that were under embargo at the time, and for that reason defendant did not ship, it would not be liable for breach of the contract." Standing alone, this would not be a correct position as to the effect of the agreement between the parties, for this requires that the obligation to ship should continue for at least ninety days, and proper effort should have been made for that period after receipt of the order, but it is a wholesome rule in the trial of causes repeatedly approved with us that the charge of the court must be considered as a whole in the same connected way in which it was given and upon the presumption that the jury did not overlook any portion of it; and if, when so construed, it presents the law fairly and connectedly, it will afford no ground for reversing the judgment, though some of the expressions when standing alone might be regarded as erroneous. *S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.,* 154 N. C., 389.

In another and related part of the charge and upon the issue, the court had just instructed the jury that if defendant failed to ship the lumber as directed, and could have shipped it to the points designated by plaintiff within ninety days covered by the contract, and failed to

do so, that it would be their duty to answer the first issue "Yes"; that would be a breach of the contract. Considering the two in connection, the jury must have readily understood that the obligation to ship was continuous for ninety days from the order, as the contract stipulates.

The exceptions to the rulings of the court on questions of evidence seem to be without merit. We do not see how the commercial rating of plaintiff company, as it appeared in the established publications, is in any way relevant to the issue, and are very well assured that, on the present record, it could have had such significance that its exclusion could amount to reversible error. And in excluding the proposed testimony of the witness W. W. Brown as to the records of the Pennsylvania Railroad office in Charlotte, N. C., in reference to an embargo on shipments to Washington and other points, the witness, who had only been in the railroad company's employment for one month, stated that he had no personal knowledge of the making of these entries, nor of the facts they purported to contain. "They were records sent down by the company every day from the office of the Pennsylvania lines in Atlanta, Georgia." The witness having said that he had no personal knowledge on the subject, any direct evidence from him was clearly incompetent. The records do not appear to have been offered, but if they had been they were not sufficiently established as to their authenticity or import as to make them receivable under our decisions appertaining to the admission of such evidence. *Ins. Co. v. R. R.*, 138 N. C., 42. Apart from this, it was not made to appear that they contained any entries relevant to the issue.

We find no reversible error, and the judgment on the verdict is affirmed.

No error.

ARTHUR WILSON AND WIFE v. LOUIS B. VREELAND.

(Filed 27 November, 1918.)

1. **Deeds and Conveyances—Lands—Covenant—Actions—Ouster.**

To sustain an action for breach of covenant of warranty in a deed to lands it is necessary to allege and show an ouster or eviction by title paramount to that acquired under the deed.

2. **Husband and Wife—Mortgages—Foreclosure—Tenant by the Curtesy—Husband a Purchaser—Title.**

Where a husband and his wife have given a deed in trust to secure an endorser on their joint note to a bank, and upon default in payment, after the death of the wife, the trustee forecloses, and it appears that there

were children of the marriage born alive capable of inheriting, the husband has a life estate in the land as tenant by the curtesy, and he may become the purchaser at the sale to the extent necessary to protect his own interest, and upon the payment of the purchase price acquire a good title when there is no suggestion of fraud or unfair dealing in the transaction.

3. Bills and Notes—Husband and Wife—Joint Makers—Accommodation—Endorser—Liability.

Where a husband and wife are joint makers of a note, their liability, as between themselves, is one-half of the full amount, nothing else appearing, though as between them and the payee or an accommodation endorser it is in the total amount of the obligation.

ACTION, tried before *Harding, J.*, on demurrer to the complaint, at October Term, 1918, of MECKLENBURG.

The case shows that on 31 December, 1910, W. M. Long, at their request and for their accommodation, endorsed a joint note of Z. A. Dockery and his wife, Emma J. Dockery, due and payable at the Charlotte National Bank twelve months after its date, and they executed a deed of trust to secure and save harmless the endorser on land belonging to the wife. Default having been made in the payment of the note, the trustee sold the land under the power contained in the deed, and Z. A. Dockery purchased it at the sale, and the trustee conveyed the land to him for a full and fair price and without any fraud being alleged. Z. A. Dockery's wife, Emma J. Dockery, died intestate after the execution of the deed of trust and before the sale, leaving children by her marriage, so that at the time of the sale her husband, Z. A. Dockery, had become tenant by the curtesy of the land. The land passed by mesne conveyance to the defendant, who conveyed it with warranty to the plaintiff, who sues for a breach of the covenant, and prays in his complaint that he recover the purchase price of the land ($630) and interest from the time he bought it from the defendant, which was on 27 September, 1917.

The defendant demurred to the complaint, and the court sustained the demurrer and gave judgment for the defendant, with costs, holding that the title to the lot is vested in the plaintiff in fee simple, and that he has a good and indefeasible title thereto, and that the plaintiff in his complaint has not stated a good cause of action.

Plaintiff appealed from this judgment.

Thomas W. Alexander for plaintiff.
Louis B. Vreeland for defendant.

WALKER, J., after stating the case: It appears in this case that the plaintiff is suing for a breach of the covenant of warranty in the deed

of the defendant to him without alleging an ouster or eviction by title paramount, which is necessary. On the contrary, he alleges that he is in peaceful possession of the land, and there is nothing to show that his possession has been disturbed. 11 Cyc., 1125, where it is said that to constitute a breach of such, a covenant there must have been an eviction or equivalent disturbance by title paramount, and the title or right to which the covenantee yields must be not only paramount to his own, but paramount to that of any one else. *Britton v. Ruffin*, 120 N. C., 89; *Wiggins v. Pender*, 132 N. C., at p. 640.

There is a covenant of seisin in the deed to plaintiff, a copy of which is annexed, and such a covenant is broken, if the title was not good, upon delivery of the deed. *Britton v. Ruffin, supra*. But we do not see why plaintiff was not seized under his deed. At the time that Z. A. Dockery bought at the trustee's sale he was tenant by the curtesy, and therefore had a life estate in the land. The sale was not made by himself, but by the trustee, and he had the right to buy in order to protect his interest in the land by preventing a sacrifice of it. It is said in *Froneberger v. Lewis*, 79 N. C., 426, at p. 436: "Wherever the trustee has a personal interest in the trust property, there, of course, he must have the right to protect it, and if to bid for and buy it be necessary to protect it, he must be allowed to do so for *that* purpose." Here the purchaser was a trustor and occupied a stronger position than a trustee would. See, also, *Smith v. Black*, 115 U. S., 308; *Easton v. Bank*, 127 U. S., 532.

Z. A. Dockery paid a full price for the land, and there is no suggestion of fraud or unfair dealing on his part or in any respect by any one. So far as this record shows, there is nothing that assails his title acquired at the sale. He submitted to a sale of his interest in the land to pay his part of the debt, which was one-half as between him and his wife, and for all that we may know from this case the value of his interest may have been more than that of the remainder, which belonged to his children and which was subject to the payment of their mother's share of the indebtedness. Both Dockery and his wife were liable to the bank and Mr. Long, the accommodation endorser, for all of the debt; but as between themselves they were severally liable for one-half. He was not legally bound to his wife for the payment of her half, though he was so bound to the creditors. We need not continue the discussion as to this matter, for it does not appear in the pleadings as now framed but that he has a good title. Whether he is any way liable to his children at law or in equity we cannot decide because the facts are not before us.

There is a suggestion in the complaint that Z. A. Dockery has put a cloud upon the title, but no facts are alleged to show it, and Dockery is not a party to the action. For anything that appears to the contrary,

he may have acquired a perfectly good and indefeasible title. *Hinton v. Pritchard*, 120 N. C., 1, at p. 4. We are governed by the record and the facts only that appear therein.

Z. A. Dockery acquired the legal title by the purchase of the property at the trustee's sale, and there is nothing to show that he did not also get the equitable title, or one that will survive investigation and adjudication in a court administering equitable principles. *Froneberger v. Lewis, supra; Hinton v. Pritchard, supra; Smith v. Black, supra; Easton v. Bank, supra.*

The demurrer was properly sustained.

No error.

NATIONAL SURETY COMPANY v. MOSES B. BROCK.

(Filed 27 November, 1918.)

Evidence—Federal Records—Certified Copies—Statutes—Distiller's Bonds—Principal and Surety.

Under the Federal statutes, a distiller and the surety on his bond are made liable for all taxes and penalties imposed, when the taxes have not been duly paid by stamps, at the time and in the manner provided by law, as determined by the Commissioner of Internal Revenue and the assessment lists certified to the proper collectors, etc. In an action by the surety against the distiller to recover a penalty the former had paid on demand without notifying the latter, it is *Held*, that a certified copy of the assessment lists on record in a public office or department of the government was the best evidence of their contents, under the provisions of our statutes, and that parol evidence thereof is improperly admitted, constituting reversible error, to the defendant's prejudice.

ACTION, tried before *Cline, J.*, and a jury, at Spring Term, 1918, of DAVIE.

Plaintiff sued for the recovery of $5,000, the amount of a distiller's bond given by the defendant to the United States to secure the payment of taxes assessed against him, and which the plaintiff had signed for him as surety. The plaintiff paid the amount of the bond to the Government upon a simple demand by it and without any notice to the defendant until this action was commenced. The liability of the surety company and the defendant depended upon whether the taxes were duly assessed and a list thereof certified, as directed by the Federal statute, Revised Statutes of the United States, sec. 3182, which provides: "The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determination and assessments of all taxes and penalties imposed by this title or accruing under any former internal revenue

act, where such taxes have not been duly paid by stamps, at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors, respectively, who shall proceed to collect and account for penalties so certified." U. S. Comp, Statutes (1918), West Pub. Co. Ed., sec. 5904.

The plaintiff was permitted to prove by a witness, without producing the record or showing its loss or any other reason for not producing it, that the assessment had been made and certified and the contents thereof, and this was done over the defendant's objection and is assigned as error.

The jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Hastings, Stephenson & Whicker and John C. Wallace for plaintiff.
A. E. Holton and B. C. Brock for defendant.

WALKER, J., after stating the case: The judge erred in admitting the oral evidence of the contents of the assessment list, as the rule is that they must be proved by the writing itself or by an exemplified or certified copy thereof. 1 Elliott on Evidence, sec. 205. It is said that "the rule rests upon the presumption that where it appears that better evidence is withheld, the party who withholds it and seeks to substitute therefor evidence of an inferior kind has some sinister motive in doing so, or is conscious that his claim would not be supported, but would rather be defeated, if he introduced the best evidence. The object of the rule is to prevent fraud, and at the same time it brings out the most satisfactory evidence" and relates to the quality rather than to the quantity of evidence. 1 Elliott on Evidence, secs. 205, 206, 207, 212, and 409; Lockhart on Evidence, sec. 76; *Rollins v. Wicker*, 154 N. C., 560; *Varner v. Johnston*, 112 N. C., 570; *Mott v. Ramsey*, 92 N. C., 152; *Cheatham v. Young*, 113 N. C., at p. 165. Of course, where the original document is lost or its nonproduction otherwise excused, the rule does not apply. 1 Elliott on Ev., sec. 212; *Varner v. Johnston, supra*. It does not appear that the assessment list was lost nor that a certified copy could not be produced. Our statute seems to recognize the "best evidence" rule in regard to Federal documents and has provided for just such a case as this one. Revisal, secs. 1616, 1617, allowing a properly certified copy to be used as evidence to prove the contents of the original. The assessment is a matter of record in a public office or department of the Government and a certified copy can easily be obtained. The list, under U. S. Rev. Statutes, sec. 3187, when certified to the Collector of Internal Revenue of the particular district, has the force and effect of a judgment and execution, and in an action by the United States to recover the taxes so assessed it makes a *prima facie*

case of liability to the Government. *Western Express Co. v. U. S.*, 141 Fed., 28 (72 C. C. A., 516). So much more the necessity for requiring a strict compliance with the rule. We need not discuss other errors assigned.

There must be a new trial because of the error indicated.

New trial.

GASTON FARMERS WAREHOUSE COMPANY v. AMERICAN AGRICULTURAL CHEMICAL COMPANY.

(Filed 27 November, 1918.)

1. Vendor and Purchaser—Fertilizer—Contract—Breach—Measure of Damages—Evidence—Market Price.

Upon vendor's breach of contract of sale and delivery of fertilizers from 1 September to 30 November of a certain year, the measure of damages is the difference in the contract and market price at the time and place of delivery; and evidence of the market price during the following spring of the year is irrelevant and incompetent.

2. Appeal and Error—Verdict—Harmless Error.

Errors committed on the trial as to issues answered in appellant's favor are cured by the verdict.

ACTION, tried before *Webb, J.*, and a jury, at January Term, 1918, of GASTON.

The action was brought to recover damages for failure to deliver fertilizers for the fall season 1915, under a contract for the purchase of the same. The jury found (1) that the contract was made; (2) that there was a breach of it, and (3) assessed the damages at one cent.

Judgment upon the verdict for the plaintiff and both parties appealed.

E. R. Preston and S. J. Durham for plaintiff.
Tillett & Guthrie for defendant.

WALKER, J. As the plaintiff was successful on the first two issues, we cannot consider its exceptions as to them, for if there was error it was not prejudiced thereby, and it frankly admits that if it is wrong as to the exception taken to the charge of the court, presently to be set forth, its other exceptions must fail. The instruction of the court is this: "The court charges the jury that it cannot consider the price of fertilizers in the spring of 1916 as evidence of the market price on 30 November, 1915."

The fertilizer, as we have already stated, was purchased for the fall delivery, and plaintiff proposed to prove what was the price in the spring of 1916 for the purpose of further proving the price on 30 November, 1915. If this evidence was not competent, there was no evidence on the issue of damages, as plaintiff admits in its brief. The plaintiff should have been restricted to 30 November, 1915, in proving its damages for the breach of the contract, as the latter covered only the fall season—that is, from 1 September, 1915, to 30 November, 1915. The settlement of the next year, or six months after 30 November. This surely was not the true construction of the contract, but plaintiff so states its meaning in section 3 of the complaint, which is as follows: "That during the year 1915 plaintiff and defendant entered into an agreement, by the terms of which defendant agreed to supply to plaintiff various kinds and qualities of fertilizers, at prices therein agreed, upon the demand and order of plaintiff prior to 1 December of said year to an amount at option of plaintiff not exceeding ..... tons." But the law attaches that meaning to the contract. It refers to the season beginning with 1 September, 1915, and ending 30 November, 1915. *Abel v. Alexander,* 15 Am. Rep., 270; *S. v. Haddock,* 9 N. C., 462. But we do not regard this as very material and will not prolong the discussion of it.

The question is, Was it competent, in order to prove the market price on 30 November, 1915, to show what it was in the spring of 1916? What time in the spring? This season extends from 1st March to 1st June, and the general offer of proof would include the price as late as May of the next year, or six months after 30 November. This surely was not competent evidence, and the charge was correct. The two dates are too far apart, and there is evidence that the market was rising during the intervening period. There is nothing to show that the price on 30th November and that in the following spring were the same. The parties were contracting with reference to a fluctuating market in which, of course, the prices were not always the same. The contract was broken in the fall and the plaintiff was entitled to recover the difference in the contract and the market price at the time and place of delivery. This is the general rule. *Moye v. Pope,* 64 N. C., 543; *Berbarry v. Tombacher,* 162 N. C., 497; *Am. L. Co. v. Quiett Mfg. Co.,* 162 N. C., 395; *Am. L. Co. v. Drexel F. Co.,* 167 N. C., 565.

In the *Berbarry case* we held, first, that the measure of damages for a seller's breach of contract to deliver goods is the difference between the agreed price and the market value at the time and place of delivery, as fixed by the contract, and, second, that on a seller's breach of his contract to deliver, the buyer is entitled to recover nominal damages if no substantial damages be shown.

What was the price in the Spring of the next succeeding year, nothing

else appearing, is not competent proof of what the price was on 30 November, 1915, as the following cases show: *Alling v. Weisman,* 59 Atl. (Conn.), 419; *Coke Co. v. Mining Co.,* 20 So. (Ala.), 624; *McLarin v. Birdsong,* 24 Ga., 265; *Waterson v. Seat,* 10 Fla., 326; *Ramish v. Kirshbrann,* 27 Pac. (Cal.), 433; *Sweitzer v. McCrea,* 97 Ind., 404.

If we should hold evidence of this kind to be admissible, where would the line be drawn beyond which the plaintiff cannot go? How could we determine that if fertilizers sold for a certain price in the spring of one year it would have sold for the same price in the fall of the year before? There are available sources from which evidence of a more certain and definite character can be drawn as to the price at the time and place of the breach. 35 Cyc., at pp. 636, 637, states that the market price to be taken as a basis for estimating damages for nondelivery is the actual market price prevailing at the time and place of delivery for a similar grade of goods, or those of the kind and quality contracted for, and this market price should be taken as of the time the breach of the contract occurred, and not at a time thereafter, except under special circumstances which do not appear in this record. There is nothing shown in this case to withdraw it from the operation of the general rule.

In the view we have taken of the matter, the exception as to the discount becomes irrelevant, the jury having awarded only nominal damages.

Defendant, in its brief, states that it will not ask for a new trial if we affirm the plaintiff's appeal. As we have done so, it is not necessary to consider the exceptions in defendant's case on appeal. The plaintiff has been very favorably considered by the court below and has no legal or just cause to complain, especially when we consider defendant's appeal. We therefore affirm in both appeals.

Plaintiff's appeal, no error.

Defendant's appeal, no error.

S. H. LEA v. SOUTHERN PUBLIC UTILITIES COMPANY.

(Filed 27 November, 1918.)

1. Railroads — Street Railways — Negligence—Excessive Speed—Burden of Proof—Instructions—Appeal and Error—Harmless Error.

The burden of proof is upon the plaintiff to sustain his allegation and contention that he received a personal injury through the negligence of the defendant in running its electric street railway car at an excessive speed, and placing the burden upon the defendant to show that the car

was not running at an excessive rate, is reversible error; and the error is not cured by a correct instruction elsewhere appearing in the charge.

2. **Railroads — Street Railways—Negligence—Concurring Negligence—Last Clear Chance — Evidence — Instructions—Appeal and Error—Harmless Error.**

Where there is evidence tending to show that the plaintiff was on horseback, and, seeing the defendant's street car approaching at an excessive speed, when he was 10 feet from the track, attempted to urge his horse across instead of stopping, in safety, which he could have done, for the car to pass, which resulted in the injury, the subject of his action: *Held*, assuming the defendant was negligent in running the car at an excessive speed, it is for the jury to determine, upon the question of proximate cause and last clear chance, whether the plaintiff was guilty of negligence which continued and concurred with that of the defendant to the time of impact; for, if so, the plaintiff could not recover; and an instruction that fixed liability upon the defendant if the car was running at an excessive speed is prejudicial to the defendant, and constitutes reversible error.

3. **Instructions—Incomplete Charge—Phases of Evidence.**

Where the trial judge assumes to charge the law upon one phase of the evidence in controversy, the charge is incomplete unless embracing the law applicable to the respective contentions of each party to the action.

HOKE, J., concurs in the result.

ACTION, tried before *Long, J.*, at June Term, 1918, of MECKLENBURG.

These issues were submitted:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff, by any negligence on his own part, contribute to his injury, as alleged in the answer? Answer: "Yes."

3. Notwithstanding any negligence of the plaintiff, could the defendant, by the exercise of ordinary care, have prevented the injury to the plaintiff? Answer: "Yes."

4. What amount of damages, if any, is the plaintiff entitled to recover of the defendants on account of his injury? Answer: "$3,000."

Thomas W. Alexander, Cansler & Cansler for plaintiffs.
Osborne, Cocke & Robinson for defendant.

BROWN, J. This case was before us at last term (175 N. C., 461), and the opinion by *Mr. Justice Walker* granting a new trial contains a full and accurate statement of the case. The issues and evidence on the second trial appear to be substantially the same as on the first, and it is, therefore, unnecessary to do more than refer to the first opinion for a general outline of the controversy.

The defendant excepts because the judge in one part of the charge erroneously placed the burden of proof upon defendant in requiring the

jury to find by the greater weight of evidence that the car "was not being operated at a speed greater than four or five, or possibly six, miles an hour." While it was doubtless an inadvertence upon the part of the learned and painstaking judge who tried this case, yet the charge is justly amenable to that criticism, and the exception is well taken.

One of the principal allegations of the plaintiff's complaint is that the defendants were guilty of negligence in operating the car at a reckless and excessive rate of speed. The defendants denied this allegation. The burden was therefore upon the plaintiff to establish by the greater weight of the evidence the truth of this allegation of his complaint. It is true in another part of the charge the burden of proof as to such allegation was properly placed on plaintiff, but it is well settled that an erroneous instruction on the burden of proof is not neutralized or rendered harmless by another instruction stating the rule correctly. *Tillotson v. Fulp,* 172 N. C., 499; *Ray v. Patterson,* 170 N. C., 226; *Champion v. Daniel,* 170 N. C., 331; 29 Cyc., 644.

The defendant also excepts to following instruction: "If the car was moving at an excessive rate of speed, as contended by the plaintiff, and for this reason the signals could not be given or the appliances could not be used by the exercise of ordinary care, and by reason of these conditions the injury occurred, then, under such findings of fact, if made by you from the evidence, the rule would be that the defendant would be liable for the result of the injury." The defendant insists that this instruction deprived the defendant of the benefit of all the evidence tending to prove that although defendant may have been negligent in such particular, yet the plaintiff was guilty of such negligence as continued up to the moment of the injury, and concurred with that of defendant in producing it. The exception must be sustained.

There is evidence of Rucker, a passenger, that even after the motorman sounded his gong and reversed his car plaintiff continued to switch his horse and rush across the track in full view of the approaching car. Plaintiff himself testified: "As I got farther on I saw the street car kept coming on without decreasing its speed, and I slapped the horse with the reins to make him go faster." Again he says, "I began speeding up my horse and slapping him with the reins after I passed the curb when the car kept coming without apparently decreasing its speed and when my horse was about ten feet from the rail."

If these facts are true, then plaintiff had the last clear chance to avoid the injury. When he saw the car coming on at a fast rate of speed, according to his own admission, plaintiff's horse was ten feet from the rail. Instead of slapping his horse with the reins and driving on the track in front of the rapidly approaching car, it was his duty to

stop. If he failed to do so, then, according to all of our decisions, he was guilty of such concurring negligence as bars a recovery.

This subject is discussed in its different phases by *Justice Walker* in *Norman v. R. R.*, 167 N. C., 533. In that case it is held that "As a person on foot or in a vehicle has no right to cross a street in front of an approaching street car and take the doubtful chance of his ability to cross in safety, if a prudent man would not do such a thing under similar circumstances; and if he does so, and is injured by his own carelessness, the fault is all his, and he cannot hold the company to any liability therefor."

Assuming that defendant was negligent in running its car at an unwarranted speed, yet plaintiff admits he saw it approaching when he was ten feet from rail. It was his duty to stop. If, instead of pursuing the course of obvious safety, he undertook to drive across the track in front of a rapidly running car and was struck and injured, he was guilty of such concurrent negligence as bars a recovery. It is well settled that when the plaintiff and defendant are negligent, and the negligence of both concur and continue to the time of the injury, the negligence of the defendant is in a legal sense not the proximate cause of the injury, and plaintiff cannot recover. *Hamilton v. Lumber Co.*, 160 N. C., 50; *Harrell v. Lumber Co.*, 154 N. C., 262. His Honor should have so instructed the jury after instructing them upon plaintiff's contention.

We have heretofore said that when the judge assumes to charge, and correctly charges the law on one phase of the evidence, the charge is incomplete unless embracing the law as applicable to the respective contentions of each party. *Jarrett v. Trunk Co.*, 144 N. C., 299.

New trial.

J. D. PHILLIPS, ADMR. OF M. M. MORGAN, v. INTERSTATE LAND COMPANY.

(Filed 27 November, 1918.)

1. Corporations — By-Laws—Officers — Secret Limitations — Principal and Agent—Bills and Notes—Ultra Vires.

The plea of a corporation, in defense to an action upon its note, made in its behalf by its president, that it was not countersigned by its secretary, as required by its by-laws, and therefore the act was *ultra vires*, is untenable, when it appears that the corporation was owned by these officials and their wives, who had adopted no written by-laws or kept a record of their proceedings as a corporation; for the restriction relied on would only amount to a secret limitation upon the authority usually vested in the chief officer of corporations.

2. Corporations — Bills and Notes — Officers — Ultra Vires—Acceptance of Benefits—Ratification.

Where a corporation has knowingly received and continues to use property it had paid for with its note, signed by its president alone, its conduct in not restoring the property is a ratification of the act of the president in thus giving the note, though the giving thereof was without the counter-signature of the secretary, required by its by-laws, and *ultra vires*.

ACTION, tried before *Harding, J.*, at June Term, 1918, of SCOTLAND, upon this issue:

1. Is defendant indebted to plaintiff, and if so, in what amount? Answer: "$2,000, with interest from 10 January, 1912."

From the judgment rendered defendant appealed.

Edward H. Gibson and Walter H. Neal for plaintiff.
Russell & Weatherspoon and Cox & Dunn for defendant.

BROWN, J. This action is brought to recover on the following note:

$2,000. LAURINBURG, N. C., September 25, 1911.

January 10, 1912, after date, we promise to pay to the order of M. M. Morgan two thousand and no-100 dollars at the First National Bank, Laurinburg, N. C. Value received.

INTERSTATE LAND COMPANY,
By A. A. JAMES, *President.*

Defendant denies the indebtedness, averring that the note was without consideration and given for the sole accommodation of plaintiff's intestate. Further, defendant avers that the note was executed by its president without authority.

The plaintiff offered evidence tending to prove that the note was given for "boot money" in a trade of automobiles; that plaintiff owned a new and valuable car and traded it to defendant for an old and cheap one, and that the note represented the difference in value.

This question was put to the jury very clearly and fairly and the plaintiff's contention sustained. We find no error in that, either in the rulings on evidence or in the charge.

It is contended that the by-laws of defendant did not permit the corporation to execute a note except when signed by the president and attested by the secretary, and that the act of the president is *ultra vires*. According to the evidence of President James, the corporation had no by-laws and kept no minutes of the directors' meetings. No by-laws have ever been adopted by directors at a meeting of the board and reduced to writing. This corporation is owned exclusively by its president, secretary, and their wives. They adopted no written by-laws and

kept no records. There seems to have been a secret agreement that all notes should be countersigned by the secretary.

The president of a corporation is *ex vi termini* its head and general agent. While his authority may be restricted by written by-laws legally adopted, it cannot be controlled by secret restrictions and agreements among the owners of the corporation. *Watson v. Mfg. Co.,* 147 N. C., 475; *Davis v. Ins. Co.,* 134 N. C., 60; *Bank v. Oil Co.,* 157 N. C., 302.

In addition to this, the evidence discloses a ratification of the debt if plaintiff's version is the true one, as the jury has declared. The defendant needed the new automobile in its business and retained it. The law will not allow defendant to repudiate the act of its president and at the same time retain the property for which the note was given.

No error.

D. H. MARSHBURN ET ALS. v. ISAAC JONES ET ALS.

(Filed 27 November, 1918.)

1. **Statutes—Stock—No-Fence Law—"Change of Fence."**

The requirement of Revisal, sec. 1675, that the counties therein named may withdraw from the operation of the no-fence law, upon the conditions specified therein, if funds are provided by a tax levy, etc., for "changing the fence," is to provide against trespass by the running at large of stock into no-fence territory, and contemplates the change from the one system to the other; and the position is untenable that the statute is inapplicable when the fence has long since been lawfully removed or destroyed.

2. **Statutes—Repealing Statutes—Conflict—Stock—No-Fence Law—Fences.**

Where a statute amends Revisal, sec. 1675, by adding a part of another county to those therein named as having the right to withdraw from the stock law under certain conditions, and makes the building of the fence around the outer boundaries of the proposed district a condition precedent to the exercise of this right, repealing conflicting laws, the condition imposed by the later statute is not in conflict with the provisions of the section of the Revisal requiring that the expense of the fence be met by a tax levy, etc.

3. **Statutes—Public Policy—Stock—No-Fence Law—Fences.**

Our public policy with respect to the running of stock at large has been changed by our statutes on the subject of "no-fence" or stock laws, and the uniformity, with slight exception, of their application to the entire State; and while Revisal, sec. 1675, permits the counties therein enumerated to withdraw, upon certain conditions, from "stock-law" territory, this is to be done with regard to the rights of those districts where the law is effective, requiring that the districts withdrawing therefrom shall

erect the boundary fences necessary to keep the stock from trespassing upon the rights of the larger class of people within the "no-fence" territory.

4. Statutes—Repealing Statutes—Conflict—Stock—Fences—No-Fence Law.

The act of 1917, placing Pender County among those specified in Revisal, sec. 1675, as having the right to withdraw from stock-law territory, etc., by repealing all laws in conflict therewith, does not affect the provision in the Public-Local Laws of 1915 relating to Pender County, and requiring as a condition precedent that, before its operative effect, a fence shall be built around the defined district.

5. Injunction—Public Policy—Multiplicity of Suits—Stock—No-Fence Law.

Where a proposed "no-fence" district has not been established according to the statute (Revisal, sec. 1675), equitable relief by injunction will lie against those who permit their stock to run at large and trespass upon the rights of others, upon the ground that such is against the well settled policy of the State; and that multiplicity of suits will be prevented.

HOKE and ALLEN, JJ., dissent.

THIS is an appeal by defendants from the order of *Stacy, J.*, continuing to the hearing a restraining order against the defendants allowing their live-stock to run at large in Pender County, which was heard by consent of all parties at Wilmington, 8 July, 1918.

C. E. McCullen and C. D. Weeks for plaintiffs.
J. H. Burnett and John D. Bellamy & Son for defendants.

CLARK, C. J. The General Assembly of 1913, chapters 248 and 276 placed the county of Pender within the public policy now prevailing over nine-tenths of the territory of this State, under what is known as the "no-fence" law, by which stock are not allowed to run at large on the lands of others than their owners, and requires that such owners shall fence up their stock instead of other people fencing them out in order to protect their crops.

The Legislature, by Public-Local Laws 1915, chapters 116 and 505, permitted the people of a certain part of Pender County to decide by vote whether they should return to the former system of letting stock run at large, but made such provision, if adopted by such vote, dependent upon the condition precedent, that the change should not take effect until a fence should be constructed by such territory to prevent the stock therein trespassing upon the people of the adjoining counties in which the owners of crops are protected by law against stock running at large. The act further provided that in the tax levy to build such fence the property of *natural persons* in Rocky Point Township should be exempted.

On such vote being held, the majority was cast for a return of the county (exclusive of Rocky Point Township) to the former system of stock running at large; but this Court held in *Keith v. Lockhart,* 171 N. C., 451, that the stock could not be turned out until the condition precedent of building the county fence to protect adjacent counties from the depredations of Pender County stock was complied with, and that funds to build such fence could not be raised under authority of that act because it exempted the property of natural persons in Rocky Point Township, which was a violation of Constitution, Art. VII, sec. 9, which requires that "All taxes levied by any county, city, town, or township shall be uniform and *ad valorem* upon all property in the same, except property exempt by the Constitution."

Under the laws in force, the property of the citizens is protected from stock running at large in the adjoining counties of Duplin, Sampson, Bladen, New Hanover, and Rocky Point Township in Pender; that is to say, in all the adjoining territory except Onslow on the east. By the terms of the Acts in question, it was expressly provided that "*It should not go into effect* until the fence was built," for the people of the adjoining territory were deemed by the Legislature to be entitled to the protection against stock running at large no matter whence they came, whether from their own territory or from the county of Pender.

Public-Local Laws 1917, ch. 99, amended Revisal, 1675, by placing Pender among the counties authorized to withdraw from stock-law territory upon a vote of the people upon compliance with certain provisions, and repealed "all laws in conflict therewith." The proposition was thereupon submitted to the people and adopted; but the fence around the territory in Pender voting to withdraw has not yet been built. Revisal, 1675, contains as the first proviso the following as a condition for the withdrawal of any territory from the stock-law territory after such vote has been had in its favor: "*Provided,* the expense incurred in changing the fence in such boundary, district, or territory so released be paid by the property holders in such boundary, district, or territory, and that the commissioners of the county levy the tax to pay the same on the property holders of such boundary, district or territory so released, but shall not be further liable for keeping up said stock-law fence."

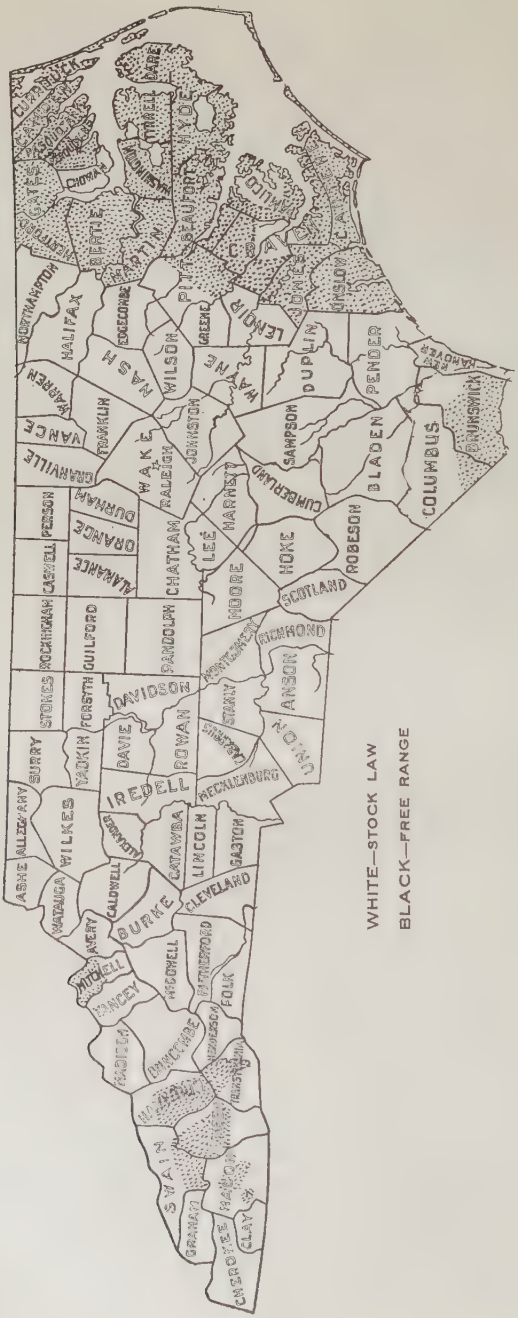
Upon the election held after such amendment to Revisal, 1675, the majority voted to withdraw from the stock-law territory all the county outside of Rocky Point Township. The commissioners then attempted to levy a tax upon all the property in the county, outside of Rocky Point Township, to build such fence, but in *Godwin v. Comrs.* they were restrained from levying the tax because it was laid upon all property, both real and personal, and was therefore void because not authorized by a vote and no appeal was taken. The commissioners then levied the

tax as an assessment, and this was enjoined because it was not authorized by the statute in question. *Hawes v. Comrs.*, 175 N. C., 268. Thereupon the defendants and others who wished their stock to run at large turned them out notwithstanding the provision that the stock-law fence must first be erected had not been complied with. There is no repeal, express or implied, of such requirement, for it does not conflict with Revisal, 1675. This conduct by defendants is enjoined by the order of the judge in this case. The action of the judge is in accordance with the law and must be sustained.

1. Revisal, 1675, under which the vote to change to stock running at large was held, contains a proviso that the "expense incurred in changing the fence" in territory wishing to return to the former condition of stock running at large must be paid by the property holders of such district. The defendants contend that such provision amounts to nothing because the fences in Pender having been abolished since 1 March, 1913, putting up such fence is not "changing the fence." This is "sticking in the bark." The evident intent, and the only possible meaning of the provision, is to require a fence to be put up for the protection of the territory left in the stock-law territory where the people are still to be protected against stock running at large. It means a "change" to the system where every man has to fence his crops against the stock of any one who permits them to run at large on his neighbors from the system now prevailing throughout almost the entire State of each man fencing up his stock on his own land to prevent their depredating on the property of others, for the section (1675) adds "they shall not be further liable for keeping up said stock-law fence."

2. The defendants contend that the provision repealing all laws in conflict with this provision, placing Pender under section 1675, repeals all need of fences on the outer boundary of the territory voting to change "its fence system," but clearly it does not repeal the provision in the act of 1915 that before stock shall be allowed to run at large in Pender the fence shall be erected to protect the people of Duplin, Sampson, Bladen, and New Hanover counties, and Rocky Point Township, nor the general law of the State, which prohibits stock running at large in their territory. Certainly this burden has not been put upon those people, who are many times as numerous, collectively, as the people of that part of Pender who have voted to return to the system of stock running at large. The latter are authorized to do so by the Legislature, but there is no provision that they may disregard the general policy of the State which protects the people outside from stock running at large. It is for that part of Pender which desires to let stock run at large to bear the expense of keeping their stock off no-fence territory, and not the people of the adjoining counties named.

3. The defendants contend that under the decisions of the Court in


WHITE—STOCK LAW
BLACK—FREE RANGE

Jones v. Witherspoon, 52 N. C., 555, and *Laws v. R. R., ib.*, 468, it was held that "by the public policy of this State the owners of stock are allowed the privilege of letting them run at large upon the property of others without being liable for damages done by them in such trespasses, and that, on the contrary, the owners of crops are liable for not keeping up fences to prevent trespasses from their neighbor's stock." This loses sight of the fact that these decisions were rendered prior to the war in 1860—fifty-eight years ago—and that in the meantime the public policy of the State as to fences, as evinced by numerous statutes and provisions, is now exactly the contrary.

Judge Battle said in *Laws v. R. R.*, 52 N. C., 468: "In England, where all, or nearly all, the lands are enclosed by the respective owners, the law requires that each proprietor shall keep his horses, cattle and other live-stock on his own premises; and if he permit them to go upon the land of another, it will be a trespass for which he will be held responsible. In the first settlement of this country by our ancestors, the condition of things was so entirely different that we were compelled to adopt another rule. Here only a very small part of the lands—that is, such as were actually in cultivation—were enclosed, and it was impossible for the proprietors to keep their comparatively numerous flocks and herds within the bounds of their enclosures. These flocks and herds were, therefore, allowed to go at large, and as early as the year 1777 every planter was compelled, under a heavy penalty, to keep a sufficient fence, at least five feet high, about his cleared ground under cultivation during crop time. This was manifestly done to prevent disputes and possible worse consequences arising from damages done to growing crops by the ravages of live-stock; and the act proceeds upon the assumption that the live-stock, whether consisting of horses, cattle, or hogs, were not to be kept up by their owners, but might lawfully be permitted to range at large."

By reason of conditions here formerly (contrary to the public policy in England) stock were allowed to run at large and the owners of crops were required to fence them against the trespasses of their neighbor's stock; now the owners of stock are required, as in England and in nearly all the other States of this country, to keep their stock from running upon the lands and crops of their neighbors. This has been changed by the great increase in arable land and in the value of crops as compared with the value of stock running at large and upon the experience that stock kept up, fed, and looked after by the owners are more valuable than those permitted to run at large, by the steadily growing scarcity of wood and other material and higher cost for labor required for fencing crops, the lesser expense of fencing in the stock, and the need of tick eradication. Besides, the principle applies in this case, as in all

others, *"sic utere tuo ut alienum non laedas"—i. e.,* "every man has a right to use his own, provided he does not do so to the injury of the rights of others."

Besides these and other arguments which have caused the extension of the "no-fence law," the "Commission for the Conservation of Food" have recently called attention to the fact that in this State last year $60,000 worth of stock were killed by railroad locomotives, a very small per cent of which loss occurred in the no-fence law counties, but almost entirely in that small part of the State in which the free range still obtains. At the same ratio, if stock had been allowed to run at large throughout the State, the destruction of stock and the loss of food thereby would amount annually to far over a half million dollars, for less than one-tenth of the State is now outside of the stock-law territory.

Our Legislature, in deference to the wishes of the people of any locality, have given them opportunity to declare whether they shall adopt the policy of each man fencing up his stock or of every man fencing out the stock of others. The result has been the growth of the stock law in North Carolina, until now it prevails over nine-tenths of the State; in fact, in all the State except in parts of half a dozen townships in the mountain sections where the cultivated fields are a negligible quantity and in a few counties along the Atlantic Coast, in most of which there are large areas of land not yet under cultivation, though even in this fringe of counties there are considerable areas in which the stock law prevails.

The public policy of the State is now the "no-fence law" with the exception of the small area mentioned. In Virginia and South Carolina, our nearest neighbors, the stock law has been adopted by each State for its entire area, and the same has been done in most of the other States, even in Texas and Kansas and the other prairie States, where formerly large areas were roamed over by herds of cattle and sheep. But even there the system has been broken up by requiring the owners of herds to pasture them on their own lands, which they must buy or rent for that purpose.

With the change of our public policy as to fences, the same rule that prohibits one man to let his stock run at large, unless he will fence in his outside boundaries, applies to counties and townships, so that the county or township or district which wishes to let its stock run at large can only do so by putting up a boundary fence to keep its stock within its own territory, so as not to permit them to run at large on those who adopt the present State policy of prohibiting trespasses by stock.

The fences in Pender have been down since their abolition by the act of March, 1913. If the people of that part of Pender who wish to return to the former system of letting their stock run at large in their own territory so vote, the Legislature has authorized them to do this.

but there is nothing in that act which repeals the entire public policy of the State and permits them to turn their stock upon the people of the adjoining counties of Duplin, Sampson, Bladen, New Hanover, and Rocky Point Township. Before they can turn their stock out at large they must first protect all the adjacent stock-law territory. This is not a matter of property rights, but one of public policy, and the learned judge below properly continued the restraining order. If the stock owners in that part of Pender are allowed, by the absence of a county fence, to turn their stock loose upon the adjacent territory of the counties which have the stock law to guarantee them against such trespass, the stock of Pender could lawfully go at large to any distance and anywhere in the State.

In *Archer v. Joyner,* 173 N. C., 75, the Court said that whether the stock law or the anti-stock law should prevail and be put in force, with or without a fence, was in the power of the Legislature; but it must be distinctly noted that there is no provision in this act which authorizes any part of Pender County to turn its stock at large, without a fence around the boundaries of that part of its territory, to the detriment of the people outside who have the guarantee of the general policy of the State, as expressed by a long series of statutes, that their crops shall not be trespassed upon. The fact that this could have been done in 1860 does not put such authority into the act amending Revisal, 1675. If the Legislature had seen fit to so enact it is certain that it would not have been done without opposition from the representatives of the adjoining counties. The enactment of the statute is, therefore, evidence that if part of Pender County returns to the former system of stock running at large, it must do so subject to the right of the people of the adjacent counties to be protected by a fence around the territory which desires that the stock might run at large therein. The statute must be deemed to have been enacted in compliance with, and not in defiance of, the public policy of the State, which, except in excepted localities, now prohibits stock running at large. If free range was in force by reason of the enactment of the law of 1917, and nothing else was required, why did the defendants hold an election at all, and why did they seek to build a fence and to have the commissioners undertake to levy a tax and then an assessment?

In *Archer v. Joyner, supra,* the act extended the "no-fence law" over the larger part of Northampton County without requiring the new territory to put up a fence. This was a clear recognition that it was incumbent upon the people outside to keep their stock from running at large in the new stock-law territory, fully as much as the owners of stock within the new territory or from elsewhere.

The maxim already cited, *"Sic utere tuo ut alienum non laedas"*—*i. e.*, "One should have liberty to use his own, provided he does not infringe upon the right of his neighbor to do the same," expresses the condensed wisdom of the ages and is founded upon inherent justice and common sense. If the people of any locality are empowered by the Legislature to let their stock run at large because a majority of the people in such locality so vote, this is restricted to their own borders and does not permit them to infringe the right of the people outside to be protected against such trespasses. The people of part of Pender County cannot by their vote impose their policy in this regard upon the people of the adjoining counties. The "no-fence" law being the public policy of the State, a part of Pender County cannot be allowed to disregard the rights of those outside, certainly in the absence of a statute of the General Assembly authorizing them to do so, "without putting up an outside fence," which has not been done. This has been recognized by repeated decisions of this Court as well as by statute.

In *S. v. Tweedy,* 115 N. C., 705, it is said: "It was competent for the town to enact the ordinance that no hogs should run at large within the town limits and to prescribe a penalty for the violation of such ordinance, and it would make no difference if the owner of the hog should live outside of such limits," citing *Rose v. Hardie,* 98 N. C., 44; *Hellen v. Noe,* 25 N. C., 493; *Whitfield v. Longest,* 28 N. C., 268.

When stock is found running at large in forbidden territory it is a violation of the law in that territory, and it makes no difference whether the owners live within the territory or without. Those living without the territory are not privileged to violate the law any more than those living within the territory. In *S. v. Mathis,* 149 N. C., 548, *Connor, J.*, held that "when the stock law is in force in a county, and the owner of stock over the dividing line in another county willfully permits his stock to run at large, it is not a valid defense that no fence had been built on the line to prevent the stock from the adjoining county running at large in the county where the trespass was committed."

This is quoted with approval in the late case of *Owen v. Williamston,* 171 N. C., 57, in which we held that "the owner of hogs is not authorized to violate the town ordinance by permitting his hogs to run at large either by the fact that he lived outside the town limits, nor because his hogs do," citing *S. v. Tweedy, supra; Aydlett v. Elizabeth City,* 121 N. C., 7; *Jones v. Duncan,* 127 N. C., 118.

That case also cites *S. v. Garner,* 158 N. C., 630, where the Court held that if the owner of cattle permits them to run at large in "free-range" territory, and they stray across the line into a "no-fence" territory, he is liable though he does not turn them out for that purpose. He purposely turns them out and is responsible for the fact that they

violate the law by straying into territory where stock are forbidden to run at large.

The statute law, Laws 1909, ch. 284, is to the same effect. "In all territory where the stock-law prevails and is in force, it shall be unlawful for any person or persons living outside of any stock-law territory to turn in, or in any way cause any stock to be turned in, in the inside of said stock-law territory without first obtaining the written consent of all the landowners living inside of said stock-law territory." And as said in *S. v. Garner, supra,* when the owner turns loose his stock outside of the stock-law territory and they wander off into stock-law territory to the detriment of people living within that territory, the owner of such stock is liable because he is presumed to know the consequences of his own conduct, for the stock do not know the territorial boundaries in which they are permitted to roam. The people who wish them to roam must put up such information as the stock can read, to wit, a visible and sufficient fence on the limits of the territory in which it is intended that they may legally stray.

The Public-Local Act allowing the people of certain parts of Pender County to express their wishes whether stock should run at large in that territory, and containing a provision repealing all acts conflicting therewith, cannot be reasonably construed to repeal the protection given by repeated statutes and by the present public policy of the State that such stock shall not run at large outside of the territory so voting, which cannot be prevented unless a fence is built by such territory to restrict the limits in which their stock may legally roam.

The plaintiffs, as citizens of the State as well as citizens of Pender, in enforcement of public policy, are entitled to have this injunction continued to the hearing. They are also entitled to it, as citizens of Pender, upon the ground that if they turn their stock out equally with their neighbors, if there is no such boundary fence put up by the community, they can be indicted and their stock impounded by the people of any stock-law territory into which they may roam, with the result that the plaintiffs will be compelled to fence in their own stock, as well as to fence in their crops against their neighbors, a double burden upon them.

It appears in this action that some of the plaintiffs and some of the defendants live in Rocky Point Township and the others in the other part of Pender County, and *Judge Stacy* well says that this proceeding is in the nature of a bill of peace to prevent a multiplicity of suits, and is a matter of widespread interest to the citizens of Pender. He finds that no fence has been built, nor the old ones restored in or around the territory sought to be released from the stock law, and that the original stock-law fence between Rocky Point Township and the rest of the county has been permitted to go down and is now out of repair, and

that since the stock law in Pender was enacted 1 March, 1913, now nearly six years ago, a great many farmers, including all the plaintiffs, have allowed their fences to go down, have cleared new lands, and are cultivating the same without fences, and crops are now growing upon said lands without fences around them. He adjudges, as a conclusion, that the stock law is in force in Pender until the outside fence in the territory proposed to be released shall be built, and that great injury will result to the plaintiffs unless the temporary restraining order heretofore granted be continued until the final hearing, and that there is no adequate and sufficient protection at law. The judge also calls attention to the fact that the county commissioners have been restrained from levying a tax to build such outside fence in the case of Godwin against said commissioners because not voted for, and that no appeal was taken from such judgment, and the same is still in force. And further that in *Hawes v. Comrs., supra,* it has been held by this Court that the commissioners cannot levy an assessment upon real estate to pay the expense of erecting such fence because not authorized by the statute. His Honor also bases his ruling further upon the ground that the authority to change the territory back to free range is dependent upon the provisions that the expense of changing the fence shall be paid by the property holders in such territory; that the commissioners of the county levy the tax for that purpose. But the commissioners have been held to be without authority to levy an assessment, and they have been restrained from levying a tax.

His Honor, therefore, concludes his judgment: "It would seem, therefore, that the condition cannot be met by the commissioners under the judgment previously rendered and under the law now in force. It was not the intention of the Legislature to allow any district to withdraw from a stock-law territory simply by a majority of the votes being cast in favor of 'no-stock law' and without complying with the further provisions of the statute." He further says that these are conditions precedent, especially that of changing the fence, or else the commissioners would not have been required to levy a tax.

His Honor correctly, as we think, construes the purport of the statute as follows: "The spirit of this law and the intention of the Legislature would seem to be that whenever a given territory wishes to withdraw from the then existing no-fence law, the territory so withdrawing or changing its status with respect to the law then existing shall do so at its own expense, and shall so change the fences as to safeguard and protect the adjacent property owners from injury or damage incident to the change brought about by the action of the withdrawing territory."

The defendants base their claim that their cattle, hogs, goats, and sheep shall have the right of free pasture on the lands of others solely

upon the vote of the district in which they live, *i. e.,* Pender County, exclusive of Rocky Point Township, but such claim is contrary to the general policy of the State and to the status in Pender prior to such vote, which has no extra-territorial effect and cannot extend such claim of free pasture beyond the territory that has voted for it. There must be as a condition precedent a fence built by such territory around it, for the Legislature has not authorized the stock to run at large therein without the completion of such fence, which is necessary to protect the owners of crops in the adjoining counties from depredations by such stock. For the protection of the plaintiffs and in due regard to the well-settled public policy of the State as now recognized, and for the prevention of a multiplicity of suits, and, as *Judge Battle* said in *Laws v. R. R.,* 52 N. C., 468, "To prevent disputes and possible worse consequences arising from damages done to growing crops by the ravages of live-stock," his Honor properly continued the injunction to the hearing.

Affirmed.

CHARLES DEESE, BY HIS NEXT FRIEND, v. JESSE M. DEESE.

(Filed 27 November, 1918.)

1. **Husband and Wife—Deeds and Conveyances—Separate Estate—Purchase of Lands—Resulting Trusts—Tenant by the Curtesy—Descent and Distribution—Devise—Constitutional Law.**

When land is purchased by the wife with money belonging to her separate estate, with conveyance to the husband and wife by entirety, it is not a gift by the wife to her husband of her personal property, and, though thus conveyed at her request, creates a resulting trust in the lands in her favor; and after her death, in the absence of devise (Constitution, Art. X, sec. 6), the husband, as tenant by the curtesy, acquires a life interest therein, and upon his death the land descends to the heirs at law of the wife, a child of the marriage, in the present instance.

2. **Husband and Wife — Deeds and Conveyances—Separate Estate—Justices of the Peace—Certificates—Statutes—Probate.**

Where land, purchased with the wife's separate estate, has been conveyed to the husband and wife, the conveyance, if otherwise sufficient to apply the law of *jus accrescendi*, would be inoperative to do so upon the failure of the justice of the peace to make the certificate required by Revisal, sec. 2107.

ALLEN, J., concurs in result.

APPEAL by defendant from *Harding, J.,* at May Term, 1918, of UNION.

This was an action brought by Annie M. Deese against Jesse M. Deese, her husband, to declare him a trustee of a tract of land, the purchase money of which was paid by Annie M. Deese, but the title to

which was taken to Jesse M. Deese and Annie M. Deese. The plaintiff dying after the action was begun, her only child, Charles Deese, was substituted as plaintiff appearing by his next friend. The facts found by the jury by consent are that the land described in the complaint was purchased with money belonging to Annie M. Deese which was realized from the sale of land inherited by her from her mother, but the deed dated 12 January, 1914, was executed to Jesse M. and Annie M. Deese by the request and with the consent of Annie M. Deese.

Stack & Parker for plaintiff.
Redwine & Sikes for defendant.

CLARK, C. J. It does not appear upon the face of the deed that the grantees were husband and wife, and hence, without evidence *dehors,* the grantees would hold as tenants in common.

The jury finding, by consent, that the land was purchased with the separate property of Annie M. Deese, which had been derived from the sale of land belonging to her, there was a resulting trust in favor of the wife. *Lyon v. Akin,* 78 N. C., 258; *Cunningham v. Bell,* 83 N. C., 330. Even when the wife furnishes the purchase money and requests that the deed be made to her husband there is still a resulting trust to her. *Sprinkle v. Spainhour,* 149 N. C., 223, which says: "It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife that the spouses be *jointly entitled* as well as jointly named in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband."

In *Speas v. Woodhouse,* 162 N. C., 69, the same ruling was made by *Hoke, J.,* quoting from *Brown, J.,* in *Sprinkle v. Spainhour, supra,* as above set out. We have cited and reaffirmed those cases because of nonobservance of the requirements of Revisal, 2107, in *Kilpatrick v. Kilpatrick* and *Gooch v. Bank,* both at this term.

It is true, as claimed by the defendant, that as to conveyances of personalty there is no restriction whatever upon the right of a wife to dispose of her personalty as fully and as freely as if she had remained unmarried (*Vann v. Edwards,* 135 N. C., 661), and that in *Rea v. Rea,* 145 N. C., 532, it was held that a married woman has unrestricted power to convey her personal property and, therefore, can make a gift thereof to her husband if she thinks proper; but there are no facts in this case calling for the application of this principle. The wife here made no present of money to her husband, and this is not an action to

recover money or other personalty. It is distinctly stated that the wife's money was paid to the vendor of the land. It was not given to the husband. When the grantor therefore made the conveyance to the husband, though at the wife's request, there was a resulting trust to her. *Sprinkle v. Spainhour, supra,* and *Speas v. Woodhouse, supra.* There could be no title in the husband unless the money had been given him by the wife and he had thereafter, and not as a part of the same transaction, paid it to the vendor; and even then the deed would not have carried an estate by the entirety, but merely a tenancy in common. When the money is paid by the wife, and at her request the deed is made to the husband, this is in effect a conveyance of realty by her and invalid unless executed in the manner required by Revisal, 2107. *Kilpatrick v. Kilpatrick,* at this term, and cases there cited.

The property having been bought with the wife's separate estate, and there having been no contract executed in the manner required by Revisal, 2107, the conveyance, so far as it purported to convey any interest in the land to the husband, was a nullity, for the justice has not found the facts required by that section. The court below properly signed judgment that the defendant Jesse M. Deese was "entitled to a life estate in said lands as a tenant by the curtesy, and that the remainder or reversionary interest in said land has descended to Charlie Deese, the only child and heir at law of said Annie M. Deese." The defendant was entitled to the tenancy by the curtesy only because it does not appear that the wife had devised said land as she is empowered to do under Constitution, Art. X, sec. 6. *Tiddy v. Graves,* 126 N. C., 620.

No error.

J. A. CLARK v. JOHN SWEANEY.

(Filed 27 November, 1918.)

1. Principal and Agent — Evidence—Nonsuit—Questions for Jury—Trials—Automobiles.

In this action against the owner of an automobile to recover damages for an injury caused by the negligent driving of his son, the evidence tending to show that the son was driving his mother, the defendant's wife, at the time; that he usually did this, to the knowledge of the defendant, whose consent was not necessary to be procured; it is *Held,* that with the other evidence appearing in the record and passed upon on the former appeal, there was sufficient to take the case to the jury upon the defendant's liability, as principal, for the negligence of his son; and defendant's motion to nonsuit should have been denied.

2. Evidence—Nonsuit—Defendant's Evidence.

Upon defendant's motion to nonsuit upon the evidence, the credibility of his evidence is for the jury, and the motion should be denied if there is sufficient evidence to take the case to the jury, when considered in the light most favorable to the plaintiff.

APPEAL by plaintiff from *Bond, J.*, at June Term, 1918, of DURHAM.

This is an action for damages from being run into and knocked down by defendant's automobile while attempting to cross Main Street near the business center of Durham.

At the close of the evidence for defendant the court stated that it would charge the jury that if they believed the evidence and found the facts to be as they tended to show, the jury would answer the first issue "No." In deference to this intimation, the plaintiff submitted to a judgment of nonsuit and appealed.

Brawley & Gantt and Scarlett & Scarlett for plaintiff.
Fuller, Reade & Fuller for defendant.

CLARK, C. J. This case was before us on appeal from a nonsuit at close of plaintiff's evidence, which the Court reversed, 175 N. C., 280. On the second trial the evidence for the plaintiff was substantially the same and, in compliance with our former ruling, the case should have been submitted to the jury. On a motion for nonsuit, the evidence for the defendant could not take from the plaintiff this right, for the evidence must be taken in the light most favorable to him; in fact, there is in the evidence for the defendant something that strengthens the testimony for the plaintiff which alone was heard on the other trial. The chauffeur testified, "I would always take my mother when she asked me to go. I did not drive my father's car a great deal. My father never complained at any time about my mother and me taking off his car." The defendant's wife testified, "I did not ask Doctor (her husband) for the car. He always lets me have anything he has. I do not have to ask for it; it is not necessary." She further testified, "I do not remember saying anything to the doctor about his car. I said we were going out; that we would be back directly. Fred (her son, who was driving the car) took the car out when Doctor first got it and learned how to run it."

The pleadings admit that the automobile was owned by the defendant, Dr. John Sweaney, and that his wife was in the car at the time of the injury, and that their son Fred was driving the car. From this evidence the jury could well draw the inference that at the time of the injury to the plaintiff the son was acting as agent for his father, and "was about

his master's business." *Moon v. Matthews,* 29 L. R. A. (N. S.), 856; *Stowe v. Morris,* 39 L. R. A. (N. S.), 24.

When this case was presented before, the Court said (175 N. C., 281) that the admission that the automobile was owned by the defendant, that his wife was being conveyed in the machine at the time of the injury, and the evidence that the defendant directed his son to take the plaintiff home, was sufficient to submit the case to the jury, for "the natural presumption is that one who is employed in operating an automobile is doing so in the service of the owner, especially when the passenger in the machine is the owner's wife. *Long v. Neut,* 123 Mo., 204, citing *Moon v. Matthews,* 29 L. R. A. (N. S.), 856."

We have now the additional evidence of the son, as above stated, that he was in the habit of taking his mother out in the machine whenever she wished to go, and that his father had never complained at any time of his doing so, and the testimony of his mother that she did not deem it necessary to ask the husband for the car, because he always let her have anything he had, and that on this occasion she told him that she and her son were going out, but would be back directly, and that her son had taken the car out when the doctor first got it and learned how to run it. The testimony for the defendant that his son was not his agent is for the consideration of the jury, but cannot be taken as true upon a motion for nonsuit.

On the former hearing it was pointed out that *Linville v. Nissen,* 162 N. C., 95, relied upon by the defendant, was not in point because in that case the evidence was that though the owner's son was operating the machine he was not doing so with the knowledge or at the instance of the owner, but in violation of the owner's orders and without his knowledge, and it was further pointed out that *Linville v. Nissen* was not a nonsuit, and that this Court had held that the evidence for the defendant should have been submitted to the jury with an instruction that the owner would not be responsible for the tort of his son if acting without the owner's authority and wholly for the defendant's own purposes and in pursuit of his private or personal ends.

Error.

OSCAR M. CRAVEN v. THE BOARD OF COMMISSIONERS OF UPPER CODDLE CREEK DRAINAGE DISTRICT.

(Filed 4 December, 1918.)

Drainage Districts—Owner of Lands—Contracts—Damages—Drainage Commissioners—Judicial Acts—Fraud and Collusion—Individual Liability.

The relation between the owner of lands within a drainage district created by statute and the commissioners thereof, the former in paying the

assessment levied and the latter in laying out the district, cutting drainage canals, etc., in all respects in accordance with the requirements of the statute, is not in the nature of a contract for the failure to perform which, in respect to cutting a drainage ditch or removing obstructions therefrom, the drainage district is liable to the owner for damages done to his land by improper drainage, the commissioners having the right and power, in the exercise of their judgment, to correct and modify the details of the report of the engineer and viewers; and their acceptance of the work done under a contract in conformity with the maps and plans obtained according to the requirements of the statute, being a judicial act, it cannot be questioned, except for fraud and collusion, and then only to fix the commissioners with personal and individual liability. Chapter 442, sec. 21, Public Acts of 1909.

ACTION heard upon demurrer to complaint by *Webb, J.*, at May Term, 1918, of IREDELL.

The court sustained the demurrer and dismissed the action. Plaintiff appealed.

H. P. Grier and A. L. Starr for plaintiff.
Zeb V. Turlington for defendant.

BROWN, J. The complaint alleges, in substance, that plaintiff owns certain lands within the defendant drainage district; that in 1916 defendant "entered into a contract for the cutting of a canal through the lands embraced in said district, including those of plaintiff, which contract provided, among other things, for the cutting said canal to the width and depth as specified in the plans and specifications of the engineer making the survey of the stream and lowlands; that, based upon said plans and specifications for the cutting of the canal and draining said lowlands, the proper legal authorities of defendant had viewed plaintiff's lands and has assessed against the same the sum of $204.30, which became and was a lien upon the lands of plaintiff within said district, and which plaintiff was required and did pay before said canal was cut through the lands of plaintiff and those lying below his lands on said stream in said district."

The complaint further alleges that defendant did construct, cut, and excavate said canal according to the plans and specifications of the engineer and upon which it had assessed and collected assessment against plaintiff's lands, but failed and neglected to remove obstruction immediately below plaintiff's land in said canal, and failed and neglected to cut said canal and excavate the same to the required depth, so that same was obstructed and prevented the flow of the waters therein, and not of sufficient depth and width to drain the lowlands of plaintiff, whereby said land remained wet and unfit for cultivation and unimproved to the

great damage of plaintiff, to wit, in the sum of $204.30, with interest thereon from the 25th day of November, 1916.

The defendant demurs upon the ground that it is a corporation created by the State for drainage purposes, and that upon the facts stated in the complaint the action cannot be maintained.

A reading of the complaint discloses that this is not an action for damages for negligent performance of duty against the individuals composing the board of commissioners, but an action against the corporation itself for a supposed breach of contract in constructing a canal in which plaintiff seeks to recover the money paid out under the contract and interest on it. This is an erroneous view of the relation existing between plaintiff and defendant. Such relation was not contractual in its nature. The $204.30 was not paid in pursuance of a contract of agreement. It was an assessment levied by law upon the lands of plaintiff for the construction of a drainage canal running through the drainage district. The assessment is not based upon an agreement to pay it or any contract to construct the canal in a certain way. It is based solely upon the cost of the work, the extent and value of the land, and the benefits it would probably receive from this construction of the canal.

The defendant has the power, and, so far as the complaint discloses, employed a competent engineer, who made all the plans and specifications for the construction of the work, and under whose supervision the work was done.

Under the statute, the board of commissioners have the power to correct and modify the details of the report of the engineer and viewers *if in their judgment* they can increase the efficiency of the drainage plan and afford better drainage to the lands in the district without increasing the estimated cost. Chapter 442, sec. 21, Public Acts of 1909.

The acceptance of the work of the contractors as a compliance on their part with the contract was a judicial act of the board of commissioners and cannot be questioned except for fraud or collusion, and then only to make the commissioners personally and individually liable.

Affirmed.

MARTHA GIBSON ET ALS. v. STEPHEN TERRY.

(Filed 4 December, 1918.)

1. Appeal and Error—Objections and Exceptions—Evidence—Ground of Exception—Statement by Court.

Upon the trial of an action to recover lands, there was evidence that the father of the plaintiffs, A., and the defendant, S., took the lands by devise from their father, with provisions that they should care for their mother

until her death; that A. moved West after the death of his father, and that S. remained with his mother until her death. S. offered to show by his witness the declarations of A. before he moved away, which were excluded by the judge, under his statement that they were incompetent if for the purpose of proving a conveyance of the land: *Held*, the evidence for that purpose was incompetent, and it devolved upon the defendant to state any other ground upon which he had offered it, if any he had, for his exception to have consideration thereon.

2. Appeal and Error—Objections and Exceptions—Unanswered Questions—Record.

Exception to the exclusion of questions asked a witness upon the trial must show, in some proper way, the relevancy and bearing the expected answers would have on the controversy, so that the Supreme Court may determine whether the appellant has been prejudiced, or the exception will not be considered.

3. Limitation of Actions — Title — Adverse Possession—Tax Lists—Admissions—Evidence.

The original tax list offered on defendant's cross-examination, over his signature, which fact he admitted, showing that the land in controversy had been listed by him in the name of plaintiff's ancestor, under whom they claim, within a shorter period than twenty years, is evidence against the defendant's claim of title by adverse possession for the twenty-year period.

PETITION for partition, in which defendant pleaded sole seisin, tried before *Adams, J.*, at September Term, 1918, of RICHMOND.

The only issue submitted or tendered is as follows: Is plaintiff's cause of action barred by the statutes of limitation? Answer: "No."

A. R. McPhail and W. R. Jones for plaintiffs.
L. Medlin and Bynum & Thomas for defendant.

BROWN, J. The land described in the complaint was devised by Champ G. Terry to his two sons, A. T. Terry and Stephen Terry. The will contained the "further proviso that my sons, A. T. and Stephen Terry, shall take good care and provision for my beloved wife, Eliza A. Terry, during her natural life."

The defendant pleads that he has been in the actual and adverse possession of the entire land for more than twenty years.

There is evidence that A. T. Terry removed to the West shortly after death of his father in October, 1893, and that Stephen Terry continued to reside on the land and cultivate it, and that his mother, Eliza Terry, resided with him until her death in 1904. A. T. Terry died intestate 16 June, 1917, leaving the plaintiffs and Stephen Terry as his heirs at law.

The defendant asked the following question of witness C. B. Terry:

Q. State whether Mr. A. T. Terry told you, after the death of his father and before he left for the West, what he had done with his interest in this land—whether he told you he had given his interest in this land for Mr. Stephen Terry to take care of his mother?

Objection by plaintiffs; sustained. (The court stating that if the purpose of the question was to prove conveyance of land, the same was incompetent. The defendant stated no other purpose and the objection was sustained.) Defendant excepts.

This exception cannot be sustained. It was defendant's duty after leaving the statement of the judge to state for what purpose he asked the question. It is incompetent for the purpose of proving a conveyance of land as stated by the court. If the purpose of the question was to elicit evidence tending to prove adverse possession defendant should have so explained in response to the court.

There is another reason why the exception cannot be sustained. While the question indicates what the defendant was endeavoring to prove, it does not appear in the case on appeal what the witness would have testified to. He might have answered "Yes" or "No."

In *Knight v. Killbrew*, 86 N. C., 402, the Court says: "It is a settled rule that error cannot be assigned in the ruling out of evidence unless it is distinctly shown what the evidence was in order that its relevancy may appear, and that a prejudice has arisen from its rejection." This is cited with approval by *Justice Allen* in *Stout v. Turnpike Co.*, 157 N. C., 367.

It should have been stated in making up the case on appeal what the witness would have testified to if permitted to answer the question.

Plaintiffs offer original return of tax records identified by Stephen Terry in his cross-examination. Objection by defendant; overruled; defendant excepts.

Tax records are as follows:

Tax list of Stephen Terry—Postoffice: Ellerbe, N. C. Township: Mineral Springs. Number of acres: 46½. Description: Gibson Mills; value, $223. Also shows personal property listed. Duly verified, usual form, before R. L. Thomas, list taker, 9 May, 1917. (Signed) Stephen Terry.

Tax list of A. T. Terry—Postoffice: Donville, Miss. Township: Mineral Springs. Address of agent to whom notice may be given: Stephen Terry. Number of acres: 46½. Description: Gibson Mills; value, $223. Duly verified, usual form, before R. L. Thomas, list taker, 9 May, 1917. (Signed) Stephen Terry.

In 1916, 42½ acres listed, each in name of A. T. Terry and Stephen Terry and signed by Stephen Terry, but address of agent to whom notice may be given left blank.

In the complaint the land is described as 93 acres, and "being the same land that was devised to Stephen Terry and A. T. Terry by Champ G. Terry."

In his testimony, the defendant admitted that there was 93 acres in the tract, and testified further: "Yes, it is a fact that I gave in only 46½ acres for myself and 46½ acres for A. T. Terry. Yes, it is a fact that I always gave it in as his, and also gave it in as mine, and paid the taxes and gave it in the same on up through the year 1917."

This evidence, coming from the defendant in person and supported by the original tax lists signed by him, is not only competent, but very powerful if not conclusive evidence that the possession of defendant had never become adverse, but that it was permissive and in recognition of his brother's title.

The remaining assignments of error are without merit and need not be discussed.

No error.

LYNCHBURG SIGN WORKS v. PIEDMONT PHONOGRAPH COMPANY ET AL.

(Filed 4 December, 1918.)

Vendor and Purchaser—Contracts—Delivery—Time Specified—Later Date—Refusal of Acceptance—Time the Essence.

Where a contract of sale and delivery of goods to the purchaser states the time upon which the seller shall deliver them, time is to be regarded as of the essence of the contract, and the purchaser may refuse to accept and pay for the goods tendered for delivery at a later date.

ACTION, tried before *Cline, J.*, at February Term, 1918, of CALDWELL.

A jury trial being waived, the court found the facts and rendered judgment for $80 for plaintiff. Appeal by defendant.

M. N. Harshaw for plaintiff.
Squires & Whisnant for defendants.

BROWN, J. The findings of fact declare that the defendants ordered, in writing, from plaintiff certain phonograph Edison signs, at the price of $80, to be shipped to defendants on 1 July. The goods were not shipped by plaintiff until 9 July, and arrived at Lenoir 14 July, when defendant refused to accept them. His Honor held that "time in this case is not of the essence of the contract to such an extent as to make shipment on 9th July a failure to comply with the contract and permit defendants to reject the shipment." In this ruling there is error.

It is generally held that if the contract specifies the time when delivery is to be made, time is of the essence of the contract; and if delivery is not made within the time agreed on, the buyer is not liable.

Mr. Elliott states the rule to be that "Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods where no right of property in the same passes by the bargain from the vendor to the purchaser, and the rule in such cases is that the purchaser is not bound to accept and pay for the goods unless the same are delivered or tendered on the day specified in the contract." Elliott on Contracts, sec. 1552.

The rule is stated by the Supreme Court of the United States as follows: "In a mercantile contract, a statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty or condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract." *Filley v. Pope,* 115 U. S., 213; *Norrington v. Wright,* 115 U. S., 188.

Upon the facts found, judgment should be entered for defendant.

Reversed.

LAURA CAUDLE v. HARIET C. CAUDLE ET AL.

(Filed 4 December, 1918.)

Dower—Widows—Statutes—One Dwelling.

The widow's right of dower in her husband's lands and tenements is allowed to the same extent by our statute as theretofore existing, and thereunder she is entitled to but one-third thereof, including the dwelling-house in which her husband usually resided, and to no more, though this dwelling should be the only land or tenement subject to the right. Revisal, sec. 3084.

PETITION for dower, heard on exceptions and appeal from the clerk by *Webb, J.,* at May Term, 1918, of ROWAN.

The judge sustained the exceptions and reversed the judgment of the clerk. Plaintiff appealed.

Rendleman & Rendleman for plaintiff.
R. Lee Wright for defendants.

BROWN, J. Plaintiff is the widow and defendants are the heirs at law of Charles A. Caudle, who died seized and possessed of only one piece of real estate, a house and lot, which was his dwelling at time of his

death. Plaintiff claims that the whole should be set apart to her as dower. The contention cannot be sustained. The dower of a widow, of common right, never did extend to more than a third part of the lands and tenements of her husband, and our Legislature has never enlarged the right so as to comprehend more than a third.

Section 3084 of the Revisal provides: "That every married woman, upon the death of her husband, shall be entitled to an estate for life in one-third in value of all lands, etc., of her deceased husband, in which third part *shall be included* the dwelling-house in which her husband usually resided." This is substantially the statute law as contained in the Code, sec. 2103. Revised Code, ch. 118, sec. 3, and Revised Statutes, ch. 121, sec. 3.

There is no statute that authorizes the allotment of more than a third part of the real estate of the husband. Where such estate consists solely of the dwelling-house it follows that only a third in value of that can be allotted. Such is the law as declared in *Stiver v. Cawthorn,* 20 N. C., 645, and recognized in *Campbell v. White,* 95 N. C., 494.

In this last case, referring to an allotment of homestead, *Chief Justice Smith* says: "But it is not improper for us to say that we do not see why a portion of the house, containing rooms of sufficient value, may not be set apart as an allotment of dower."

Affirmed.

I. O. DAVIS, ADMR., v. DR. J. E. SMOOT.

(Filed 4 December, 1918.)

1. Contracts, Immoral — Public Policy — In Pari Delicto—Physicians—Evidence—Courts.

In an action against a physician to recover money that his patient has paid him under a contract to give him a certain per cent of the recovery of damages for a personal injury, in consideration of favorable expert testimony to be therein given, and in the present action it appears that the charges of the physician had been knowingly and designedly made, and that the drugs he had administered had impaired the mind of his patient until relieved by the attendance of another physician: *Held,* though a recovery is not permitted when based on immoral contracts, the courts, in the fair and impartial administration of justice, and with proper regard for their own purity and integrity, will cause restitution to be made.

2. Perjury—Contempt—Contracts, Immoral—Public Policy—Criminal Law.

Where the plaintiff's evidence would establish the fact that the defendant, a physician, had given testimony in an action of his deceased intestate upon consideration of his giving favorable expert testimony on the

measure of damages, which the defendant in the present action has denied, and the jury have found upon allegation and evidence that the defendant had entered into the contract knowingly and designedly, and had collected the consideration named: *Held*, the defendant, upon the verdict, was guilty of gross contempt of court, with recommendation to the solicitor to consider a bill of indictment charging perjury as to the defendant's testimony in the former action.

APPEAL by defendant from *Webb, J.*, at April Term, 1918, of CABARRUS.

The complaint alleges that defendant, a practicing physician, who was an expert witness in an action to recover damages for personal injuries, over and above his expert witness fee allowed in the action and in addition to his regular bill for medical services, unlawfully charged and collected of plaintiff's intestate $125 for services as a witness in said case, which the complaint alleges was done knowingly, designedly, willfully, maliciously, and unlawfully; that the defendant had unlawfully and willfully represented to his intestate that he would be worth that much to him because he would so describe his injuries to the jury as to make his damages much larger, and that if plaintiff's intestate did not agree to said charge of 20 per cent of any amount he might recover against the city of Concord, that he would not be a willing witness for him; that plaintiff recovered a verdict of $625, and that the defendant, who had been allowed and had received an expert fee of $10, had thereafter collected $125 for testifying, as shown by an item in his receipted bill for medical services, "to 20 per cent on $625, *i. e.*, $125," and that the plaintiff has demanded the return of said $125 of the defendant, which he has refused.

From the verdict and judgment thereon in favor of the plaintiff the defendant appealed.

G. A. Carver for plaintiff.
Maness & Armfield for defendant.

CLARK, C. J. The following issues were submitted to the jury:

1. Did the defendant, Dr. J. E. Smoot, knowingly, designedly, willfully, and maliciously and unlawfully charge A. M. Davis 20 per cent of the amount recovered by A. M. Davis from the city of Concord, as alleged in the complaint? Answer: "Yes."

2. What amount, if anything, is the defendant indebted to the plaintiff? Answer: "$125."

There seems to be no controversy about the facts, and the defense is rested upon the ground that the agreement was void as against public policy, and hence that the money having been paid the plaintiff cannot

recover it back. It is public policy that such a contract as this cannot be enforced, but it is also public policy that such a transaction as this cannot be allowed to stand simply because the defendant was able to enforce payment of the illegal exaction. Besides, there is in this case evidence that the defendant gave the plaintiff's intestate morphine and other medicine; that the defendant, who "had made a very good witness" at the trial, collected said $125 with great promptness after plaintiff's intestate had received it.

There was evidence that the mind of plaintiff's intestate, while Dr. Smoot was visiting him and giving him morphine, was in a very unsatisfactory condition, but when a new doctor took charge and stopped the morphine his mind got better. One witness testified "He had taken morphine until his mind was scattered and he did not know what he was doing. The morphine was given him by Dr. Smoot."

Mr. Hartsell, the counsel for the intestate in his action against the city, testifies that he did not at the time know anything about the contract for the 20 per cent to be paid Dr. Smoot, and that after it was paid the intestate tried to get him to see Dr. Smoot to secure the return of the money, but he declined to have anything to do with the matter.

The plaintiff testified that when he asked the defendant to return the $125 he inquired whether the lawyer, Hartsell, was going to pay back his fee, and when told that he was not asked to do so the defendant replied that he had done more good to the plaintiff in that action than the lawyer. The witness further testified that he asked the defendant "If he had not known he was getting a per cent if he would not have been willing to have helped my father out in testimony, and he said he would not have helped him as much. My brother was there and heard this." The defendant did not go on the stand to contradict this evidence.

The defendant's counsel contended in this Court that if there was any wrong done it caused the city of Concord to pay larger damages to plaintiff's intestate than he was entitled to recover, and, therefore, if there is to be any restitution it should be made, not to the plaintiff but by the plaintiff, to the city of Concord.

The evidence does not disclose that the recovery against the city was too large, or that the defendant perjured himself to make it such. This is not charged in the complaint, and to say the least, it is an unusual defense. So far as the record discloses, the testimony of Dr. Smoot at the trial may have been truthful. The ground of the recovery by the plaintiff is not that Dr. Smoot swore falsely in favor of their client, but that he made representations that his testimony would be more effective if he were paid 20 per cent of the recovery, and that after the trial he collected said 20 per cent out of the client over and above his expert fee of $10 allowed by the court.

The courts not only will not enforce an executory contract of this kind, but it will compel repayment when collection has been made and there is, as in this case, evidence that the party making payment was under treatment, and also under the influence of morphine administered, by the defendant until after the money was paid him, and that thereafter when his physician was changed defendant's mind improved and he made an effort to secure the return of the money.

Upon the verdict on the first issue based on above evidence, that this money had been "designedly, willfully, maliciously and unlawfully collected by the defendant," the court very properly gave judgment for its return. No court with a proper sense of its own dignity and of purity in the administration of justice, which should be always above suspicion, could permit such a transaction to stand simply because the offender has been quick enough to secure payment before proper action could be taken. The defendant, upon the verdict, was guilty of gross contempt of court.

It is commended to the consideration of the court below whether, upon the evidence in this case, proceedings in contempt should not be taken by the court in vindication of public justice, and it is for the solicitor to consider whether a bill should not be laid before the grand jury for indictment of perjury in view of the intimation by the defense in this trial that the plaintiff's intestate was unduly benefited by the too favorable testimony of the defendant in the trial of the action against the city of Concord. The transaction is not one that the court can in justice to itself allow to go off without investigation. The answer does not deny the receipt of 20 per cent of the recovery by the defendant, and alleges that it was a voluntary gift, but the defendant did not go on the stand nor put on any evidence to support such defense. That the defendant, in a civil action, does not go upon the stand in his own behalf to explain a matter calling for such explanation is a legitimate subject for comment even by counsel before a jury. *Goodman v. Sapp,* 102 N. C., 477; *Hudson v. Jordan,* 108 N. C., 12, and cases cited in Anno. Ed.

This certainly calls for investigation by the court, as above stated. Such conduct by a witness as is here alleged and found true by the verdict strikes at the very root of the administration of justice. The courts cannot permit it to pass by unnoticed.

No error.

G. H. GEITNER ET ALS., EXRS., v. EDMUND JONES ET ALS.

(Filed 4 December, 1918.)

1. **Trusts and Trustees—Creditors—Reconveyance of Trust Estate—Notice.**

A grantor of lands in trust for creditors, to pay off all outstanding mortgages and encumbrances, and all other debts and obligations, who takes a reconveyance of the land under an erroneous recitation in the deed of the trustee that the trusts have been fully administered, is, notwithstanding, fixed with notice of an outstanding obligation, especially when coming within the terms of the trust deed, at the time of the reconveyance, a party defendant to an action to recover it.

2. **Same—Payment—Burden of Proof.**

Where a trustee in a deed conveying lands to pay the grantor's creditors endorses on a note theretofore given by the debtor that it was secured by the trust deed, and, pending an action for the foreclosure of the deed in trust, reconveys the land to the grantor, erroneously reciting the full administration and discharge of his trust, in an action upon the note, the burden of proving payment is upon him.

3. **Trusts and Trustees — Reconveyance of Trust Estate — Admission of Funds—Notice—Burden of Proof.**

Where the trustee in a deed to lands for the benefit of creditors reconveys the land to the trustor, reciting that the trusts therein have been fully performed, the trustee's recitation in his deed is evidence that he has some funds out of which to pay the trustor's debts remaining unpaid, and the grantee in the reconveyance is bound by its terms, and the burden of his plea of payment is upon him.

4. **Limitation of Actions—Bills and Notes—Administrators—Statutes.**

Where the maker of a note has died before the statute of limitations has run thereon, the payee may institute his action within one year after the issuing of letters testamentary, provided such letters were issued within ten years after the death of the debtor, Revisal, sec. 367, being an enabling statute; and where the note has not been barred, the foreclosure of a deed in trust, securing it, may be ordered. Revisal, sec. 391 (3).

5. **Statute of Frauds—Pleadings.**

The defendant cannot successfully avail himself of the statute of fraud when he neither denies the debt or pleads the statute.

6. **Statute of Frauds — Bills and Notes — Prior Indebtedness — Trusts and Trustees—Writing.**

A note given for the payment of a debt existing prior to, but secured by the deed in trust for the benefit of creditors, is in recognition of the old debt, and not a novation, and the transaction is within the intent of the statute of frauds requiring that contracts concerning lands, etc., shall be in writing.

7. **Trusts and Trustees—Deeds and Conveyances—Trust Estate—Reconveyance—Beneficiaries—Creditors—Consent—Foreclosure.**

A trustee in a deed conveying lands to secure the grantor's creditors cannot reconvey the lands to the trustor, free from the trusts imposed, except

with the consent of the beneficiary; and the beneficiary may maintain his suit to foreclose upon the lands as the real party in interest.

8. Statute of Limitations—Nonsuit—Administration—Statutes.

Where Revisal, sec. 367, relating to the time of bringing an action on a note within a year after letters of administration granted, if within ten years from the death of deceased maker, and section 391 (3), relating to the foreclose of the security for the note, apply, their provisions are not affected by the fact that additional parties to the action, ordered by the Supreme Court, had not been made before a succeeding term of the Superior Court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal.

APPEAL by plaintiff from *Webb, J.*, at August Term, 1918, of CALDWELL.

W. B. Councill and Squires & Whisnant for plaintiffs.
W. C. Newland and Lawrence Wakefield for defendants.

CLARK, C. J. This case was before us 173 N. C., 591, on appeal from a judgment dismissing the action. This the Court corrected by directing that the plaintiffs should bring in the personal representative of J. G. Hall, deceased, as a party defendant.

On 5 January, 1910, J. G. Hall and wife executed to the defendant Jones a deed of trust to sell and convey certain lands therein described and to "pay off, first, all mortgages and other encumbrances outstanding against such lands, and, secondly, all other debts and obligations of the said J. G. Hall, personally, as may have been contracted prior to the execution of this deed." It is admitted that prior to that date J. G. Hall was indebted to the testator of the plaintiffs in the sum of $300, which debt was renewed from time to time until 18 March, 1912 (after the trust deed was executed), when the note in suit was executed.

The defendant trustee wrote on the back of this note that it was secured by a deed in trust on real estate. While the former suit was pending for the foreclosure of said deed in trust the defendant trustee reconveyed the lands to the widow of J. G. Hall erroneously reciting that the trusts in the deed of 5 January, 1910, "have been fully administered and discharged." The grantee in the reconveyance was a grantor in the deed of trust and was fixed with notice of the trust therein to pay this debt. Moreover, she was a defendant in this action, then pending, to recover this debt.

The court allowed the motion for nonsuit on the ground that the plaintiffs have failed to show any funds in the hands of the trustee that were liable for the payment of the note in question. The execution of the note was admitted and it was in evidence with the endorsement of the trustee thereon. The defendants having pleaded payment, the burden of the plea was on them. *Guano Co. v. Marks,* 135 N. C., 59. If

the trusts had been satisfied and the debts paid the trustee must have had some funds out of which to pay them, as recited in his reconveyance, and the grantee in such deed is bound by its terms, and the burden of showing payment is upon the defendants.

The court below was of the opinion that the action was barred by the statute of limitations. The note in suit fell due 18 June, 1912. A. A. Shuford, the payee, died 2 May, 1912. J. G. Hall died 1 August, 1913, and his personal representative was not appointed till 4 August, 1917. Hall having died before the expiration of the time limited for the commencement of this action, the plaintiffs were entitled to institute this action "within one year after the issuing of letters testamentary, provided such letters are issued within ten years after the death" of the debtor. Revisal, 367. His administrator was made party to this action by summons issued 15 February, 1918, and the claim therefore is not barred. *Coppersmith v. Wilson,* 107 N. C., 31; *Winslow v. Bent,* 130 N. C., 58, which holds that the section is an enabling and not a disabling statute. The debt not being barred, foreclosure of the security can be ordered. Revisal, 391 (3).

The court further held that the statute of frauds applied, but it is not pleaded, nor contract denied, and cannot avail the defendants. *Jordan v. Furnace Co.*, 126 N. C., 143. The deed in trust did not specifically mention this debt, but it secured "all debts of J. G. Hall contracted prior to the deed in trust," and it is admitted that this debt came within that description. The note in evidence of it was executed after the deed, but that did not affect the fact that the debt was created prior to the deed in trust. The note was a promise in writing to pay the debt, and not a novation.

There is no indefiniteness as to the debt which is admitted in the answer, nor as to the payee. The trustee cannot discharge himself from the trust and avoid liability by reconveying the property to the settler without payment of the trust secured except with the consent of the beneficiary. 39 Cyc., 437. The beneficiary can subject the property to foreclosure notwithstanding the reconveyance, and can maintain the action as the real party in interest. *Gorrell v. Water Supply Co.,* 124 N. C., 328, and cases cited in Anno. Ed.

When the case was here before (*Geitner v. Jones,* 173 N. C., 591) the Court sent the case back to make the personal representative of the deceased husband an additional party. This was not done at the next succeeding term below and the court ordered the action discontinued. There was no appeal taken from such judgment, but this new action was brought 15 February, 1918, and, being within the statutory time, it would not be barred even if a year had elapsed after the discontinuance. *Grimes v. Andrews,* 170 N. C., 522.

Reversed.

PROFFITT MERCANTILE COMPANY v. STATE MUTUAL FIRE INSURANCE COMPANY.

(Filed 4 December, 1918.)

1. Insurance, Fire—Denial of Liability—Proof of Loss—Waiver.

The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified.

2. Insurance, Fire — Title — Encumbrances — Payment—Evidence—One Inference, Verdict Directing—Instructions.

Where the policy of fire insurance specifies that the title to the property destroyed is in the insured, testimony of the insured that there had been a chattel mortgage thereon, but it had been paid off and discharged before the issuance of the policy, permits but one inference to be drawn, if found to be true by the jury, and an instruction to that effect is a correct one.

APPEAL by defendant from *Cline, J.*, at June Special Term, 1918, of AVERY.

Lowe & Love and F. A. Linney for plaintiff.
R. W. Wall, J. W. Ragland, and M. W. Nash for defendant.

CLARK, C. J. This action is to recover for loss by fire upon two insurance policies, one for $300 on fixtures and $1,000 on stock of goods. The loss by fire and the value of the goods are not in controversy. The defendant in its brief abandons all exceptions except 7 and 8. Exception 7 is because the court refused to nonsuit the plaintiff because of the failure of the plaintiff to file claim for loss and because the property was mortgaged, and Exception 8 is because the court instructed the jury "If you believe the evidence in this case to answer the issue 'Yes,'" and to assess the plaintiff's recovery at three-fourths of the fair, reasonable value of the goods and fixtures covered by these policies that were lost and destroyed in the fire, provided the amount shall not exceed $1,000 on the goods and merchandise and $300 on the fixtures.

The uncontradicted testimony of the plaintiff is that when he asked for a blank to make out the proof of claim the agents of the defendant told him it was not necessary to do anything, and the company did not send him any blank or any letter asking him to make out proof of claim. The defendant denied liability and refused to pay the loss. This is a waiver of the right to demand proof of loss and the denial of liability dispenses with the necessity of filing such proof. *Gerringer v. Ins. Co.*, 133 N. C., 407; *Parker v. Ins. Co.*, 143 N. C., 343; *Lowe v. Fidelity Co.*, 170 N. C., 446.

There is no evidence of a chattel mortgage on any of the property either at the time the policy was taken out or at the time of the fire.

The only evidence on the point is on the part of the plaintiff, who testified that there had been a mortgage on the property, but it had been paid off and discharged before the policy of insurance was taken out. There was but one inference which could be drawn from the testimony, if found to be true by the jury, and the court instructed the jury correctly. *Cauley v. Dunn,* 167 N. C., 32.

No error.

METROPOLITAN DISCOUNT COMPANY v. GEORGE M. BAKER.

(Filed 4 December, 1918.)

Negotiable Instruments — Acceptances — Purchaser—Fraud—Due Course—Vendor and Purchaser—Evidence.

In an action to recover upon an acceptance of which the plaintiff claims to be a holder in due course, and there is evidence to show it was given in the purchase of jewelry by sample, which upon delivery was ascertained to be of very inferior or unmerchantable quality and not according to the sample, and the action is defended upon the ground that the sales agent had perpetrated a fraud therein upon the acceptor of the paper: *Held,* the burden was upon the plaintiff to show that he was a purchaser in due course, before maturity, in good faith, for value, without notice of the infirmity of the instrument, etc. (Revisal, secs. 2201, 2208); and evidence of the defendant as to its price, inferior quality, or that it was not up to the standard and had been refused by his customers, etc., is competent.

APPEAL by plaintiff from *Cline, J.,* at July Term, 1918, of MITCHELL.

Charles E. Greene for plaintiff.
No counsel for defendant.

CLARK, C. J. This is an action begun before a justice to recover on five acceptances of $40, each executed to the payee therein, the National Novelty Import Company, of St. Louis, Mo. It appears that the salesman of said company came to the defendant's place of business in Bakersville, N. C., and sold him silverware and jewelry, by sample, for which these acceptances were given. The defendant testified that when the articles came they were very inferior and not up to the sample, and the jury find that the execution of the acceptances were procured by the false and fraudulent representations of the National Novelty Import Company.

The court instructed the jury that if the plaintiff bought the acceptances in the open market, in a fair and honorable way, as negotiable

paper in the ordinary course of trade, that is in good faith and before maturity for valuable consideration, to so find. The plaintiff company resides in St. Louis, where the payee of these notes also resides. The jury found the second issue in the negative.

The only exceptions are that the court permitted the defendant to testify from whom he bought the silverware, and how much he paid for it; that the silverware was permitted to be exhibited to the witness, who was allowed to state that it was not a standard brand; that he was also permitted to state that he offered the jewelry for sale, and that it was inferior, and that he would not have purchased it if he had known its quality. All these exceptions were upon the first issue, and the evidence was competent as tending to show the fraud perpetrated by the agent in the sale of the goods. It seems strange that the defendant gave his acceptances before the goods came.

The plaintiff claimed, however, that it was a purchaser in due course, having taken the paper before maturity in good faith and for value, and that it had no notice of any infirmity in the instrument or defect in the title of the person negotiating it, and therefore is entitled to recover. Revisal, 2201. The jury have found the second issue to the contrary, and there is no exception as to that issue nor to the charge, nor for any refusal to charge.

The defendant having pleaded fraud as to the execution of the paper and introduced evidence, the burden was upon the plaintiff to prove by the greater weight of the evidence that it was a holder in due course, for value, and without notice. Revisal, 2208; *Campbell v. Patton,* 113 N. C., 481; *Mfg. Co. v. Summers,* 143 N. C., 109; *Bank v. Fountain,* 148 N. C., 590; *Park v. Exum,* 156 N. C., 228; *Bank v. Walser,* 162 N. C., 62; *Trust Co. v. Ellen,* 163 N. C., 46; *Smathers v. Hotel Co.,* 168 N. C., 72; *Bank v. Branson,* 165 N. C., 344.

No error.

E. L. SHERMER ET ALS. v. MARY A. DOBBINS ET ALS.

(Filed 4 December, 1918.)

1. Husband and Wife—Wife's Separate Property—Deeds and Conveyances—Probate—Statutes—Adverse Possession—Equity—Cloud on Title.

Where the wife conveys her separate realty to her husband under a deed void for failure of compliance with Revisal, sec. 2107, as to the execution and probate of the wife's deed, the living thereon of the husband and wife until his death, and her continuing thereon thereafter, affords no evidence that he obtained and held the lands adversely to her, and a deed sub-

sequently made by her to another cannot be considered as a cloud upon the title to the lands of the husband's heirs at law.

2. Husband and Wife—Wills—Wife's Separate Property—Deeds and Conveyances—Void Deed—Statute—Election—Estoppel.

A wife is not estopped by taking under her husband's will to deny the validity of her deed conveying to him her separate realty, void for noncompliance with Revisal, sec. 2107, when there is nothing definite in the will to show that he was attempting to devise her separate realty or to put her to her election, and the devise to the wife was evidently in lieu of the year's provision and dower.

3. Husband and Wife—Wife's Separate Property—Deeds and Conveyances—Void Deeds—Evidence—Declarations.

Oral declarations of the wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with the Revisal, sec. 2107.

4. Husband and Wife—Wife's Separate Property—Deeds and Conveyances—Probate—Statutes—Void Deeds—Adverse Possession—Title.

There is no presumption of ouster or of adverse possession in favor of the husband having children of the marriage, upon evidence tending to show that he lived with his wife on her separate realty during their joint lives, such as to ripen title in him under her void deed, made without compliance with Revisal, sec. 2107, regarding the execution and probate of the wife in such instances, a stricter degree of proof being required in such relationship.

APPEAL by plaintiffs from *Carter, J.*, at April Term, 1918, of YADKIN.

S. Carter Williams, A. E. Holton, and E. B. Jones for plaintiffs.
Benbow & Hanes, R. C. Puryear, and E. L. Gaither for defendants.

CLARK, C. J. The defendant, Elizabeth Shermer, inherited the tract of land (130½ acres) in question from her father, who died in 1876. The plaintiffs are the children of her and her husband, William Shermer, as is also her codefendant, Mary A. Dobbins, with whom is joined her husband.

The plaintiffs claim that in June, 1892, the defendant Elizabeth Shermer made a deed to her husband, William Shermer, for this land. They admit that it was not executed and probated as required by Revisal, 2107, but they contend that it was good color of title, and that this ripened into a good title by adverse possession. There is no evidence of adverse possession, for the husband and wife lived together on the premises until the husband's death, and since then the defendant Elizabeth Shermer has continued to live upon and occupy the premises.

The plaintiffs further allege that the defendant Elizabeth Shermer has executed a deed since her husband's death to her daughter, Mary A. Dobbins, for the land and alleged that this is a cloud upon the title

which they are entitled to have removed; but it is clear that the deed to their father under which the plaintiffs claim, being void, the conveyance by the defendant Elizabeth Shermer to her codefendant cannot be a cloud upon the title of the plaintiffs.

The plaintiffs further claim that the defendant Elizabeth Shermer was estopped by taking a devise under the will of her husband. The will, item 5, provides: "I will and devise to my children, Thomas Shermer, Elijah Shermer, and Phisa D. Mackie, and their heirs, all of my real estate to be divided between them, share and share alike; and each one of my said children, Thomas Shermer, Elijah Shermer, and Phisa D. Mackie, is to pay to my wife, Elizabeth, annually, one-sixth of the crops raised on the land allotted to each of them."

There was no specific devise which indicated that by this section her husband was devising his wife's maiden land, which the plaintiffs claim under the void deed from her to her husband, and she was therefore not put to her election. In item 1 of the will her husband gave her $300 of personal property, and in item 2 he devised her 15 acres of land for life, including the house and appurtenances. The devise to his wife was evidently in lieu of the year's provision and dower, and there was no estoppel upon the widow in accepting the same that would bar her from asserting her right to her maiden land, which is now in question.

Oral declarations of Elizabeth Shermer were properly excluded. They were not competent to supply the failure to observe the requirements of Revisal, 2107, as to the deed, nor to add to the description in the will "all my real estate" the realty of his wife.

His Honor properly nonsuited the plaintiffs. It is true that in *Norwood v. Totten,* 166 N. C., 648, the Court held that a conveyance by the wife to her husband, voidable for noncompliance with the requirements of Revisal, 2107, was yet color of title which would ripen by seven years adverse possession by the husband and his children by former marriage after her death, in that case there being no issue born alive by the second marriage, and therefore no tenancy by curtesy in the husband, but in this case the wife survived the husband and during their joint lives they occupied the land jointly without any evidence of adverse possession.

There was no ouster. There is no presumption of adverse possession against the true owner. *Fowle v. Whitley,* 166 N. C., 445. "Adverse possession to ripen color of title must be open, notorious, adverse and continuous for seven years" (*Cox v. Ward,* 107 N. C., 507), and "in proving such continuous possession, nothing must be left to conjecture." *Ruffin v. Overby,* 105 N. C., 83. There is no evidence here that the husband listed the land in his own name, but if he had done so it would not have been evidence of adverse possession, taken alone, for it is not

unusual for the husband to list the land of his wife which is in his possession in his own name.

"Acts constituting adverse possession under color of title must be such as to admit of no other construction than that the possessor claims the land adversely as his own, openly and notoriously." *Grant v. Winborne,* 3 N. C., 56; *Loftin v. Cobb,* 45 N. C., 406; *Bartlett v. Simmons,* 49 N. C., 295; *Williams v. Maxwell,* 78 N. C., 357. Even a stricter degree of proof is required when the parties are husband and wife. *Wells v. Batts,* 112 N. C., 288, quotes with approval the following: "Under various circumstances an unmarried woman, by permitting another person to possess and use her property, would be bound by any disposition he might make of it on the ground of presumed agency, where, should a husband do the same thing, the agency ought not to be inferred; and the reason is that the relationship of husband and wife implies a certain occupancy of her property by him, not falling within what would be the ordinary course of things if the relationship did not exist. 2 Bish. Married Women, 396 (Ed. 1875)." This has been approved in *Branch v. Ward,* 114 N. C., 148.

It was stated on the argument here that since the trial and judgment Mrs. Shermer, the mother of plaintiffs and defendant, has died, and, nothing else appearing, the plaintiffs on another trial could recover judgment to be let into possession as cotenants, though they could not recover in an action of ejectment against the mother; but it appears in the complaint that prior to the trial Mrs. Shermer had conveyed this land to her daughter and codefendant, Mary A. Dobbins.

It would seem that for some reason the father devised his realty to his other children, the plaintiffs, cutting out his daughter, Mary A. Dobbins. The mother, as is not unusual, "made it up to her" by conveying her maiden land to this daughter, and it may be has devised it also, as to which we are not advised by the record.

Affirmed.

GEORGE W. HOLLOWAY v. THE CITY OF DURHAM.

(Filed 4 December, 1918.)

1. Judgments—Estoppel.

To estop by adversary judgment *in personam,* it is required that the court have jurisdiction of the class of cases to which it belongs, and of the parties thereto, and subject-matter thereof, the question of the subject-matter to be determined by the controversy between the parties as set forth in the pleadings; and in proper instances the judgment will conclude the parties as to all matter directly in issue, and also as to such as

are within the scope of the pleadings which were material and relevant, or were in fact investigated and determined at the hearing.

2. **Same—Pleadings—Extraneous Matters—Invalidity.**

A judgment of the court upon matters beyond the scope of the pleadings, and which undertakes to settle and determine those entirely foreign to the controversy, is, to that extent, not binding, and may be treated as a nullity, even in a collateral proceeding.

3. **Judgments—Estoppel—Consent—Pleadings—Extraneous Matters.**

While a judgment entered by the consent of the parties, with the sanction and approval of the court, may be considered as somewhat in the nature of a contract, and, in proper instances, may be entered and given effect as to any matters properly included therein, of which the court has general jurisdiction, without regard to the pleadings, this cannot apply, under the doctrine of estoppel by judgment, to extraneous matters not embraced in the pleadings or in the consent judgment entered thereon.

4. **Same—Municipal Corporations—Sewage—Nuisance.**

Entering a consent judgment against a city for damages, past, present, and prospective, caused to the plaintiff's land by dumping raw sewage into a stream, for and on account of all causes of action set forth and sued upon "in the complaint, and in full for all damages to the plaintiff, his heirs and assigns, or to their property, by the building, etc., of the defendant's plant," etc., "the same being on a tract of land—distant from plaintiff's land about 150 yards," does not include within items terms damages to the plaintiff's other land afterwards acquired, and as to damages to this land the judgment will not operate as an estoppel, the words, "buildings, etc., of the defendant's plant," referring to its structure and maintenance, when properly conducted, and not to its "negligent operation," which creates a nuisance, to the plaintiff's injury.

ACTION, tried before *Bond, J.*, and a jury, at March Civil Term, 1918, of DURHAM.

Plaintiff, owning a tract of land on Ellerbee Creek, in said county, in 1917, sued for damages thereto done by defendant in wrongfully dumping raw sewage into said creek, creating a nuisance and causing substantial injury to same, and also in the negligent operating of its septic tank and disposal plant used in connection with the sewage system of the city. There was denial of liability by defendant, and also plea of estoppel by judgment, preventing any and all further recovery by plaintiff by reason of the matter and things set forth in the complaint.

On the call of the present cause for trial it appeared that heretofore, in 1905, plaintiff had sued for similar damages to a tract of land in said county abutting on said creek, the same being the tract on which plaintiff then resided with his family, etc. On denial of liability at January Term, 1917, that cause was compromised and consent judgment entered therein in terms as follows:

"This cause coming on to be heard before his Honor, M. H. Justice, judge presiding, and a jury trial being waived:

"It is now, by consent, ordered and adjudged that the plaintiff recover of the defendant the sum of $400 and the costs of this action to be taxed by the clerk of this court.

"It is further ordered and adjudged that this judgment is in full compensation and payments of all damages sustained by plaintiff, his heirs and assigns, past, present and prospective, for and on account of all the causes of action set forth and sued upon in plaintiff's complaint filed in this action, and also in full of all damages done or that may be done to plaintiff, his heirs and assigns, or to their property by the building, erection and maintenance of the bacterial plant by defendant, the same being on a tract of land purchased by the city of Durham from F. C. Geer and distant from plaintiff's land about 150 yards." Which said judgment had been paid.

It was further admitted on both sides that when the former judgment was rendered plaintiff in this action did not own the tract of land "he is now suing about," but bought same after said judgment was rendered. It also appeared that there was no allegation in the complaint that the disposal plant had been changed in any way so as to make the same different from what it was when the former judgment was rendered. Plaintiff offered to introduce evidence tending to sustain his cause of action, but on an intimation of the court that he would hold said judgment to be an estoppel in bar of any recovery, plaintiff submitted to a nonsuit and appealed.

Brawley & Gantt for plaintiff.
J. L. Morehead for defendant.

HOKE, J. In order to an effective estoppel of record by an adversary judgment *in personam,* it is required that the court which rendered it should have "cognizance of the class of cases to which it belongs and should have acquired jurisdiction of the parties and of the subject-matter, and this question of jurisdiction of the subject-matter is determined by the controversy between the parties as presented and disclosed in their pleadings." This position, so stated by *Chief Justice Beasely* in *Munday v. Vail,* 34 N. J. L., 418, affirmed in *Dodd v. Una,* 40 N. J. Eq., 672, was approved and applied here in *Hobgood v. Hobgood,* 169 N. C., 485-91, and, recognizing this as the true test, it is held in numerous and well-considered cases here and elsewhere that such a judgment will conclude the parties as to all matters directly in issue and as to all matters within the "scope of the pleadings which were material and relevant and were in fact investigated and determined at the hearing.

Propst v. Caldwell, 172 N. C., 594; *Cropsy v. Markham*, 171 N. C., 44; *Coltraine v. Laughlin*, 157 N. C., 282; *Gillam v. Edmonson*, 154 N. C., 127; *Tyler v. Capehardt*, 125 N. C., 64; *Jordan v. Farthing*, 117 N. C., 188; *Fayerweather v. Ritch*, 195 U. S., 277; *Aurora City v. West*, 74 N. C., 103. When, however, a court going beyond the scope of the pleadings, undertakes to settle and determine matters entirely foreign to the controversy between the parties as they have presented it, the judgment, or that portion of it, does not bind and may be treated as a nullity."

As held in *Munday v. Vail, supra*, "a decree which is entirely aside of the issue raised in the record is invalid and will be treated as a nullity even in a collateral proceeding." And in illustration of the same principle it was held here, in *Gillam v. Edmonson, supra*, "That an estoppel of record will bind parties and privies as to matters in issue between them, but it does not conclude as to matters not involved in the issues, nor when they claim in a different right." If this were adversary judgment, therefore, its effect as an estoppel between the parties would be necessarily restricted to the controversy about the land or the injuries to it that the plaintiff then owned and lived on and which he made the subject-matter of his complaint, and could in no sense be extended to the present tract which he has acquired since the former judgment was rendered.

The defendant does not question the soundness of this position as applied to a judgment *in invitum*, but insists that this being a judgment by consent the parties are not confined to the matters in controversy presented in their pleadings, and that the present judgment was intended to be and is an adjustment concluding the parties as to any and all damages that plaintiff, his heirs and assigns, might at any time suffer from the erection and maintenance of defendant's plant. The decisions of this State have gone very far in approval of the principle that a judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the Court and would seem to uphold the position that such a judgment may be entered and given effect as to any matters of which the court has general jurisdiction, and this with or without regard to the pleadings. *Bank v. McEwen*, 160 N. C., 414; *Brown v. Braswell*, 139 N. C., 139; *Bank v. Comrs.*, 119 N. C., 214; *Vaughn v. Gooch*, 92 N. C., 524. Such a ruling has the support of well-considered authority elsewhere. *Fletcher v. Holmes*, 25 Ind., 458; *Seiler v. Mfg. Co.*, 50 W. Va., 208, 218; Beach Modern Equity Practice, sec. 794; 2 Black on Judgments, sec. 705; 23 Cyc., 728.

Where, however, as in the case presented, the parties have defined and stated their rights and grievances by pleadings duly filed, a judgment in adjustment of the controversy should primarily and naturally be re-

ferred to the issues as presented in the pleadings and before a judgment, additional or foreign to the subject-matter, can be upheld as a judgment by consent, it should very plainly appear that the parties intended such an effect, and it should never be enlarged beyond the clear import of the terms they have used. Under this, undoubtedly the correct rule of interpretation, even if the consent judgment relied upon should be construed as extending to property other than that of the subject-matter of complaint, it should at least be confined to such property as was then owned by plaintiff; and, furthermore, as to any additional land, the protection secured against claims for any and all damages incident to the "building, erection and maintenance of the plant" refers to the structure and maintenance of such a plant, and not to "its negligent operation," creating thereby a nuisance to the injury of the plaintiff's property, as alleged in the present complaint.

There is error in the ruling of the court, and this will be certified that the matters in controversy may be submitted to the jury on appropriate issues.

Error.

P. D. WILLIAMS ET ALS. V. COUNTY COMMISSIONERS AND BOARD OF EDUCATION OF POLK COUNTY.

(Filed 4 December, 1918.)

1. Taxation—School Districts—Elections—Constitutional Law.

The taxing of a statutory special school district is not for a necessary expense and falls within the provision of our Constitution, Art. VII, sec. 7, requiring the approval of a majority of the qualified voters therein.

2. Elections—Qualified Voter—Majority Vote—School Districts.

One who is qualified to vote at an election to establish a statutory special school district, requiring the levy of a tax, must be duly registered pursuant to law and having the present right to vote; and the requirement that the measure shall be carried by a "majority of the qualified voters," by correct interpretation, signifies a majority of the qualified voters of the district appearing upon the registration book, and not a majority of those voting in the election.

3. School Districts—Statutes—Requirements—Interpretation.

A special school district may not be formed under the provisions of our statutes if the proposed district has less than 65 children of school age, unless the same shall contain 12 square miles of territory, etc.; and where it has been properly established that the extent of the proposed area meets the requirement of the statute, the provision as to the number of children of the school age, within the district, becomes immaterial.

4. Elections—Qualified Voter—Poll Tax.

A voter within a proposed special school district who has not paid his poll tax is disqualified to vote at the election called for determining the question submitted.

5. Elections—Registration—Registrar—Erasing Names—Request of Voter—Statutes.

When one who is qualified to vote at an election upon the question of establishing a statutory special school tax district has duly registered according to law, the registrar is without authority to erase his name from the registration book, at his request, the registration book being in the nature of a public record, which may not be changed, except by some method provided by law; the power to order a new registration or revise the "polling book" of voting precincts being conferred by statute on the county board of elections. Gregory's Supplement, sec. 4305.

6. Taxation—Injunction—Majority Vote.

Where it appears from the trial of the action upon its merits that the proposition to establish a special school-tax district has been carried by a majority of one vote, ascertained only after the registrar had improperly erased the name of a voter from the registration book, the restraining order theretofore granted should be made permanent.

ACTION, tried before *Cline, J.*, and a jury, at Spring Term, 1918, of POLK.

The action was to set aside the formation of a special school-tax district in said county to be known as "Sunny View," and to restrain the collection of the tax therein on the ground:

1. That same was not of sufficient area and did not contain the number of pupils required for the purpose.

2. That the special tax contemplated had not received a majority of the qualified voters of the proposed district.

On denial of the impeaching allegations, the jury rendered the following verdict as relevant to the questions presented:

1. Were there less than sixty-five children of school age in the proposed new special school district at the time it was laid out by S. B. Edwards under the direction of the county board of education? Answer: "Yes."

2. If less than sixty-five, does this special school district contain at least twelve square miles in area? Answer: "Yes."

3. Was W. T. Brown a registered qualified voter with the right to vote in the special school election in July, 1917? Answer: "Yes."

4. Was Aden Bennet a qualified registered voter at said election? Answer: "No."

5. Was F. E. Whitesides a registered qualified voter in said election? Answer: "No."

6. Was W. Brookshire Brown a duly registered and qualified voter in said election? Answer: "Yes."

7. Was Fred Gibbs a duly registered and qualified voter in said election? Answer: "Yes."

Upon the verdict and certain recited admissions, the court entered judgment as follows:

"This cause coming on to be heard, and being heard before his Honor, E. B. Cline, judge presiding, and a jury, the jury answered the issues submitted to them as appear of record, reference to which is hereby made. It was shown by the registration book and admitted that the total number of names therein for said school-tax election was originally forty-three, and that two of these, to wit, Ayden Bennet and F. E. Whitesides, were marked off the book by the registrar. It is also admitted that W. Brookshire Brown and Fred Gibbs did not vote in said election and were not counted as registered qualified voters in making up the return. Also that the return found and certified that twenty-one votes were cast in favor of the school tax and eighteen against. Upon the verdict and these admissions, either shown in the pleadings or made upon the trial, it is now, therefore, on motion of defendants' counsel, considered, ordered and adjudged by the court that at said special school-tax election a majority of the registered qualified voters cast their ballots in favor of the school tax, and, therefore, that said election resulted in the approval and adoption of the special tax in the manner prescribed by law.

"It is further considered, ordered, and adjudged that the restraining order and injunction granted in said cause be and the same is hereby dissolved and vacated.

"It is further considered and adjudged that the said school district was laid out and established according to law, and that the proper authorities are entitled to proceed as they may be advised to levy and collect the tax which is the subject of this controversy.

"The defendants will go hence without day and recover of the plaintiffs and their surety their costs to be taxed by the clerk."

From judgment, plaintiffs appealed, assigning errors.

Solomon Gallert for plaintiff.
Smith & Shipman for defendants.

HOKE, J. The present statute on the subject (Revisal, sec. 4129, amended in 1909, ch. 856, and 1911, ch. 135, now appearing in Gregory's Supplement, p. 659) prohibits the formation of school districts having less than sixty-five children of school age unless the same shall contain at least twelve square miles of territory, or unless it is separated by dangerous natural barriers from a schoolhouse in the district of which the proposed new district is a part, etc., and the jury having found that

the proposed district contains the twelve square miles of territory the first ground of plaintiffs' complaint is removed by the verdict.

As to the objection to the proposed tax levy, our decisions on the subject are to the effect that a taxing district of this character is within the provisions of our Constitution, art. 7, sec. 7, restraining counties and other municipal corporations from contracting debts, levying taxes, etc., except for the necessary expenses thereof, unless approved by a majority of the qualified voters therein. *Stephens v. Charlotte,* 172 N. C., 564; *Smith v. School Trustees,* 141 N. C., 143, and that the subject of this proposed tax is not a "necessary expense" within the meaning of this inhibition. *Sprague v. Comrs.,* 165 N. C., 603; *Hollowell v. Borden,* 148 N. C., 255.

It is also held that a qualified voter is one having the constitutional qualifications for the privilege, who is duly registered pursuant to law, and has the present right to vote at the election being held. *Pace v. City of Raleigh,* 140 N. C., 65, and, further, that the term "majority of the qualified voters" required by the Constitution to approve such a measure as this, by correct interpretation, signifies a majority of the qualified voters in the district and not a majority of those voting in the election. *Clark v. Statesville,* 139 N. C., 490; *Duke v. Brown,* 96 N. C., 127.

An application of these principles to the facts presented in the record are, in our opinion, against the conclusion reached by the lower court, and the judgment directing the levy of the tax must be set aside and a new trial had.

From these facts it appears that while thirty-nine votes were cast at the election, twenty-one for and eighteen against the proposed tax, on the morning of the election there were forty-three names on the registration list, all duly qualified and registered voters except Aden Bennet, who had not paid his poll tax, thereby being disqualified under the decision in *Pace v. Raleigh, supra.* Leaving out his name, there were forty-two duly qualified voters in the district having the present right to vote. In order to reduce this number so as to make twenty-one a majority for the proposition, as the law requires, it becomes necessary to uphold the action of the registrar, who, just prior to the opening of the polls or during the day, erased from the registration list the name of the voter, F. E. Whitesides, claiming authority to do so by reason of a request from him, the registrar, testifying to the matter as follows: "I erased the name of F. E. Whitesides from the registration book. He simply asked me to. I did not erase it when he asked me; he wrote me a letter to erase it and I marked it off the morning of the election. He first asked me in the presence of two men, as well as I recollect it. I did it that morning. He did not appear and ask to vote. . . ." And

again: "I scratched F. E. Whitesides' name off without any challenge or anything, and yet I certify here he had paid his poll tax. I just marked it off the book because he asked me to take it off. I took it off without any ceremony or examination and any notice."

On this, the evidence relevant to the question, we are of opinion that the registrar was without lawful authority to erase the name of the voter from the registration list and the validity of the election must be determined as if his name regularly appeared thereon. While the Constitution and statutes have not made either registration or voting compulsory, when the list of resident voters is made out pursuant to law, it becomes in the nature of a public record, one in which the public have a vital interest, and it should not be altered or depleted at the mere wish of the individual voter who is still a resident of the district and otherwise qualified for registration. Such a position would tend to introduce too great an element of uncertainty into elections of this character and might at times afford too great an opportunity for fraud and imposition. We are well assured that a record of this character should only be changed in some way and by some method provided by law. The power to order a new registration or to revise the "polling book" of voting precincts is conferred by the statute on the county board of elections. Laws 1913, ch. 138; Gregory's Supplement, sec. 4305, and in *Casey v. Dare County,* 168 N. C., 285, decided intimation is given that the registrar has no power himself to erase names from the registration list.

For the error in upholding the action of the registrar in erasing from the list the name of the voter, F. E. Whitesides, and by reason of which the jury have found that he was not a qualified voter, there must be a new trial; and if, on a second hearing, the facts are as now presented, the proposed tax levy should be enjoined.

New trial.

J. H. WALLACE v. TALLAHASSEE POWER AND LIGHT COMPANY.

(Filed 4 December, 1918.)

1. Master and Servant—Employer and Employee—Negligence—Evidence—Questions for Jury—Nonsuit—Trials—Railroads.

In an action by an employee to recover damages for the alleged negligence of his employer, for an injury received from the derailment of a gasoline car, termed a "speeder," by reason of its defect, while being operated by the defendant at the time in question to carry the plaintiff and other employees to work, there was testimony of defendant's witness tending to show that the car had been worked on a day or two before the

injury, because of a defect in the wheel next to the flange; that there was a rough noise while the car was running, caused by the welding made to remedy the defect, until worn smooth; that the axle of the car was crooked just after the injury, and, upon cross-examination, he was uncertain or indefinite as to the condition of the axle at or before the time it occurred: *Held*, apart from the presumption of a negligent defect in the wheel at the time of the injury, the evidence was sufficient to be submitted to the jury upon the issue of defendant's actionable negligence.

2. **Master and Servant—Employer and Employee—Negligence—Assumption of Risks.**

An employee does not assume the risks attributable alone to his employer's own negligent breach of the duty he owes to him, or where the injury complained of has not arisen from conditions of an enduring kind, or under circumstances that have afforded him a fair opportunity to have known of these conditions and enabled him to have appreciated the risks and dangers to which he was thereby exposed.

3. **Master and Servant—Employer and Employee—Evidence—Contributory Negligence—Trials.**

Where the evidence tends to show that an employee, the plaintiff in the action, was thrown to his injury by a derailment of defendant's gasoline car, or "speeder," under circumstances sufficient to establish the defendant's actionable negligence therein, by reason of a defect in the car or in the wheel near the flange, a suggestion that the plaintiff may have safely jumped from the car as it bumped along the track after the derailment, and that therefore his contributory negligence in not having done so barred his recovery, is untenable.

4. **Master and Servant—Employer and Employee—Railroads—Gasoline Car "Speeder" — Standard Track—Derailment—Negligence—Presumption—Burden of Proof—Instructions.**

Where the employer operates a gasoline or "speeder" car over its standard-gauge railroad track, for the purpose of carrying its employees to their work, the rule of liability as to its negligent acts causing injury to one of them, by a derailment of the car, is the same as applicable to roads regularly operated for railroad purposes; and an instruction that if the fact of derailment should be found by the jury, upon the evidence, the burden shifted to the defendant, and that it was required to show from the facts in evidence that the derailment and resultant injury was not due to negligence on its part, is a correct one, when giving the defendant the benefit of its position that the presumption was a rebuttable one.

ACTION, tried before *Webb, J.*, and a jury, at April Term, 1918, of CABARRUS.

The action was to recover damages for an injury arising from an alleged negligent derailment of a gasoline car, termed a speeder, operated at the time on defendant's road at Baden, N. C., and by which an employee of defendant, being carried to his work, was thrown forward on the track and run over and received painful, serious, and permanent physical injury.

On denial of liability by defendant and pleas of contributory negligence and assumption of risk, the jury rendered a verdict for plaintiff: that he was injured by reason of defendant's negligence as alleged; that plaintiff, by his own negligence, did not contribute to the injury, and assessing damages.

Judgment on the verdict and defendant excepted and appealed.

Maness & Armfield for plaintiff.
R. L. Smith for defendant.

HOKE, J. We have carefully considered the record and find no reason for disturbing the results of the trial. It is objected, first, that there is no evidence of negligence, as charged in the complaint, to wit, a derailment by reason of a defective car (1) in that it had an insufficient flange on the left hind wheel, or that same was broken and almost loose from the wheel; (2) that the hind axle was crooked. But apart from the presumption of defects arising by reason of the derailment, there are facts in evidence from the testimony of defendant's own witness, J. D. Coggins, who was operating the car at the time, permitting the inference that the car was defective in both particulars. Thus, in reference to the wheel, "The way *we were running,* the speeder was in good shape. The flange of the left hind wheel was not broken, but was worn some. A day or two before that I had it in the shop and we had it welded." . . . And on the cross-examination: "We had been working on that flange a few days before, it might have been the day before. We were working on it because there was a small defect in the wheel. The defect was about an inch or an inch and a half. It was on the wheel next to the flange. We undertook to weld some metal there. When we took it out on the track it did not make a bumping noise—just the rough noise of it. When the wheel would turn over you could hear it hit that spot, but it soon wore off." And in reference to the crooked axle, this same witness said he looked at the axle at the time of the occurrence and just after, and it was crooked; but he said that it was straight before the accident, but his cross-examination shows that the witness was not in a position to speak definitely about this, and it is the more probable and assuredly the permissible inference that the axle was crooked prior to the derailment.

It is further insisted that the court, as requested by defendant, should have submitted an issue as to "assumption of risk on the part of plaintiff," but the objection is without merit. It is held in this State that the doctrine of assumption of risk, even in cases where the same is applicable, does not extend to and include those risks and damages incident to the employer's negligence.

In the recent case of *Howard v. Wright,* 173 N. C., 339, the position as it obtains here is stated as follows: "The defense of assumption of risk is one growing out of the contract of employment and extends only to the ordinary risks naturally and usually incident to the work that the employee has undertaken to perform, and does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties," the opinion citing in approval *Yarborough v. Geer,* 171 N. C., 335; *Norris v. Holt Morgan Mills,* 154 N. C., 474-485; *Pressly v. Yarn Mills,* 138 N. C., 410; *Hicks v. Mfg. Co.,* 138 N. C., 319-327.

Even in those jurisdictions where a different concept of assumption of risk prevails, as exemplified in the decisions of the Federal courts construing the Employers' Liability Act, it is held that the position does not obtain in cases attributable to the employer's own negligent breach of duty unless the conditions thereby created are of an enduring kind or under circumstances that afford to the injured employee a fair opportunity to know of these conditions and appreciate the risks and dangers which they present. *Gila Valley Ry. v. Hall,* 232 U. S., 94; *Jones v. R. R.,* present term; *King v. R. R.,* present term.

In any aspect of the matter, there is no evidence whatever which shows or tends to show that plaintiff knew anything about the defects of the car or that he had any opportunity to appreciate the dangers to which he was being subjected when he was being carried to his work. Nor is there any evidence of contributory negligence except a suggestion, hardly borne out by the testimony, that plaintiff may have jumped from the car as it bumped along the track after the derailment. If he did this in the reasonable effort to save himself, there is nothing in the record to justify the position that it should be imputed to him for a negligent default. *Norris v. R. R.,* 152 N. C., 505.

Defendant excepts to portions of the charge, in which the court, in effect, instructed the jury that if a derailment was established, and that same was the proximate cause of plaintiff's injuries, that the burden of proof shifted to defendant and it was required to show from the facts in evidence that such derailment and resultant injury was not due to negligence on their part.

It has been decided that this, "a standard gauge" railroad truck owned by defendant and over which it was accustomed to haul material in its large manufacturing plant and operated a gasoline car or speeder for the purpose of carrying its employees to and from their work is subject to the rules which obtain in the case of regular railroads. *Goodman v. Power Co.,* 174 N. C., 661. And in such causes the rule of proof as given by his Honor has been repeatedly approved in our decisions and prevails both as to passengers and employees on the cars in

the line of duty, and whether these last are engaged in operating the trains or not. *Mumpower v. R. R.*, 174 N. C., 742; *Skipper v. Lumber Co.*, 158 N. C., 322; *Worley v. R. R.*, 157 N. C., 490; *Hemphill v. Lumber Co.*, 141 N. C., 487; *Tanner v. Lumber Co.*, 140 N. C., 475; *McNeil v. R. R.*, 130 N. C., 256; *Wright v. R. R.*, 127 N. C., 225; *Marcom v. R. R.*, 126 N. C., 200.

The charge of his Honor gave the defendant the full benefit of the position that this was a rebuttable presumption, and the further criticism that the entire facts showed that this was an excusable accident, and that the court should have so held is not borne out by the record. In our view, as heretofore stated, not only was their testimony in support of it, but there was ample evidence to carry the case to the jury without regard to the presumption.

We find no error in the proceedings below, and the judgment must be affirmed.

No error.

WILEY RUSH ET AL. V. T. B. MCPHERSON.

(Filed 4 December, 1918.)

1. **Evidence—Nonsuit—Trials.**

The trial judge should consider the evidence in the light most favorable to the plaintiff, upon motion to nonsuit, and the motion should be denied if, so considered, it is sufficient to sustain the plaintiff's cause of action.

2. **Same—Contracts—Immoral Contracts—Fraud.**

While the law will not enforce a contract which it prohibits as immoral or fraudulent, a motion as of nonsuit upon the evidence will be denied when there is evidence in the plaintiff's favor that he entered into the contract upon other and lawful motives, as where there is evidence that he had contracted with the purchaser at a commissioner's sale of land to have the bid assigned to him and receive the deed therefor, upon his paying the purchase price, after several attempts to sell the land had been made, without result, etc., and this with a lawful motive, and although there was evidence that his purchase, in this manner, tended to delay or defeat his judgment creditor while he was attempting to compromise the debt, it being a matter for the jury.

3. **Contracts—Sales—Trusts and Trustees—Resulting Trusts—Vendor and Purchaser—Deeds and Conveyances.**

An agreement between the plaintiff and the purchaser at a commissioner's sale of land that the latter assign his bid to the former and have the deed made to him upon payment of the purchase price, rests upon the express contract of the parties, and does not involve the principles relating to resulting trusts, as where the purchaser uses the money of another and takes the title, by deed, to himself.

4. Contracts—Parol Agreements—Statute of Frauds—Equity—Deeds and Conveyances—Cloud on Title—Sales—Assignment of Bid.

Where it has been established that the defendant, a purchaser at a commissioner's sale of land, was under a parol agreement with the plaintiff's deceased ancestor to assign his bid to him and have the deed made to him direct, upon his paying the purchase price, and that this had been done and the deed thus made had been lost; that the plaintiff's ancestor and the plaintiff had continuously enjoyed peaceful adverse possession of the land for many years, and that fourteen years after the completion of the transaction the defendant had acquired a deed from the commissioner to himself: *Held*, a suit in equity will lie to have the defendant declared a trustee for the plaintiff's benefit and to remove the defendant's deed as a cloud upon the plaintiff's title. Under evidence in this case, a decree providing for the reimbursement of the defendant is held to be sufficient.

5. Sales — Assignment of Bid — Contracts — Parol Agreement—Trusts and Trustees—Equity.

It is against equity and good conscience to permit a purchaser of land at a commissioner's sale to repudiate his agreement to assign his bid to another and have conveyance made direct to him upon the payment of the purchase price, because the agreement rested in parol, and thus set up the statute of frauds, to his own advantage, in repudiation of the parol trust he had assumed.

ACTION, tried before *Webb, J.*, and a jury, at March Term, 1918, of RANDOLPH.

Plaintiffs, as heirs of Wiley Rush, Sr., deceased, brought this action to have the defendant, T. B. McPherson, declared a trustee for the plaintiffs of a tract of land on the waters of Cedar Fork Creek, containing 50 acres, adjoining the lands of B. J. Fisher and others, and for other relief, upon the ground that McPherson bid off the land at a sale made in December, 1891, by J. S. Cox, commissioner, for their ancestor, Wiley Rush, Sr., and assigned his bid to Rush, and the commissioner executed a deed to Rush for the land, which was lost before its registration. In 1905, McPherson procured a deed from J. S. Cox, commissioner, for the same land. Plaintiffs also ask that this deed be declared a cloud on their title and be canceled.

The jury rendered the following verdict:

1. Did J. S. Cox, commissioner, execute and deliver to Wiley Rush a deed to the Tucker land? Answer: "Yes."

2. Did Wiley Rush and T. B. McPherson, at or before the public sale of the Tucker land on 7 December, 1891, by J. S. Cox, commissioner, agree that T. B. McPherson should bid off the land for Wiley Rush? Answer: "Yes."

3. Did T. B. McPherson transfer his bid for the land to Wiley Rush? Answer: "Yes."

4. Who paid the purchase money for the Tucker land which was sold

at the commissioner's sale on 7 December, 1891? Answer: "T. B. McPherson."

5. Is plaintiff's right of action barred by the statute of limitations? Answer: "No."

6. What damage, if any, have plaintiffs sustained by the cutting of timber on the Tucker land by the defendant? Answer: "Nothing."

Judgment was entered upon the verdict, and defendant appealed.

I. C. Moses and Brittain & Brittain for plaintiffs.
Dockery & Wildes for defendant.

WALKER, J., after stating the case: The defendant moved for a nonsuit upon the ground that one of the plaintiffs' witnesses had testified that Wiley Rush bought the land through him partly for the purpose of concealing the fact that he owned it until he could effect a compromise of a certain debt which was then pending. The witness further said that this was not his only reason, though it had something to do with it. The land was sold three times, and nobody would buy it, and Wiley Rush, Sr., said if they could not find a buyer that he would take it. There was evidence sufficient to show that McPherson bid in the land for Wiley Rush, Sr., assigned the bid to him, and that the commissioner thereupon executed a deed to Rush for the land, which has been lost.

The court was right when it refused the nonsuit, as in the state of the evidence it could not properly do so. There was evidence apart from that as to the reason of Wiley Rush, Sr., for buying the land through McPherson as his agent which would have been sufficient to sustain a verdict for the plaintiff. The judge could not base a nonsuit on only a part of the evidence. His duty was to examine the evidence and see if any view of it the plaintiff could recover, and in doing so he should have rejected all of it which was favorable to the defendant and consider only that which was favorable to the plaintiff, as the plaintiff was entitled to the most favorable view of the evidence and to have the part most favorable to him taken as true. The decisions to this effect are very numerous.

We held in *Brittain v. Westhall*, 135 N. C., 492: "On a motion to nonsuit or to dismiss under the statute, which is like a demurrer to evidence, the court is not permitted to pass upon the weight of the evidence, but the evidence must be accepted as true and construed in the light most favorable to the plaintiff, and every fact which it tends to prove must be taken as established." *Daniel v. R. R.*, 136 N. C., 517; *Biles v. R. R.*, 139 N. C., 528; *Freeman v. Brown*, 151 N. C., 111; *Morton v. Lumber Co.*, 152 N. C., 54; *Lloyd v. R. R.*, 166 N. C., 24;

Chrisman v. Hilliard, 167 N. C., 4; *Lamb v. Perry,* 169 N. C., 436.

We said in *Collins v. Casualty Co.,* 172 N. C., 543, at p. 546: "The motion for a nonsuit on the evidence was properly denied. There was evidence in the case upon which the jury could return a verdict for the plaintiff, as the evidence upon such a motion must be construed most favorably in behalf of the plaintiff, and if in any reasonable view of it he is entitled to recover it should be submitted to the jury."

The rule, as thus stated, is applicable in this case. There is a view of the evidence which, if adopted by the jury, entitled plaintiffs to recover or to a favorable verdict upon the issues. They might have found all the facts stated in the complaint and appearing in the evidence and refused to find that Wiley Rush, Sr., was attempting to deceive or defraud his creditors. This would have sustained plaintiff's cause of action. A plaintiff can be nonsuited only when the evidence in no aspect of it is legally sufficient to justify a verdict in the plaintiff's favor. *Kearns v. Ry. Co.,* 139 N. C., 470. We are, therefore, compelled to affirm the judge's ruling by which he declined to nonsuit the plaintiffs.

The principle under which contracts tainted with fraud are repudiated by the law is well stated and discussed by *Justice Hoke* in *Marshall v. Dicks,* 175 N. C., 38, where it is said: "It is the fixed principle with us and, so far as we are aware of all courts administering the same system of laws, that when the parties are *in pari delicto* they will not enforce the obligations of an executory contract which is illegal or contrary to public policy or against good morals. Nor will they lend their aid to the acquisition or enjoyment of rights or claims which grow out of and are necessarily dependent upon such a contract," citing *Fashion Co. v. Grant,* 165 N. C., 453; *Pfeifer v. Israel,* 161 N. C., 409; *Lloyd v. R. R.,* 151 N. C., 536; *Edwards v. Goldsboro,* 141 N. C., 60; *Culp v. Love,* 127 N. C., 457; *King v. Winants,* 71 N. C., 469; *Blythe v. Loving-good,* 24 N. C., 20; *Sharp v. Farmer,* 20 N. C., 255; *McMillan v. Hoffman,* 174 U. S., 639-654; *Battle v. Nutt,* 29 U. S. (4 Pet.), 184; *Armstrong v. Toler,* 24 U. S., 258 (11 Wheat.); 1 Waits Act. and Def., 43.

In *King v. Winants, supra,* it was held "that the law prohibits everything which is *contra bonos mores,* and, therefore, no contract which originates in an act contrary to the true principles of morality can be made the subject of complaint in courts of justice."

The Court said in *Blythe v. Loringgood, supra,* that "an executory contract, the consideration of which is *contra bonos mores,* or against the public policy or the laws of the State, or in fraud of the State, or of any third person, cannot be enforced in a court of justice." And in *Sharp v. Farmer, supra,* that "No action can be sustained in affirmance and enforcement of an executory contract to do an immoral act or one

against the policy of the law, the due course of justice, or the prohibition of a penal statute." This defense, though, is allowed, not for the sake of the defendant but of the law itself. It will not enforce what it has forbidden. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation. *Coppel v. Hall*, 74 U. S., 542; *Cansler v. Penland,* 125 N. C., 578.

While this rule is well established and inexorably enforced when the parties are *in pari delicto,* it does not, as we have seen, apply to this case, as the motion to nonsuit is unavailing upon the grounds already stated. We do not mean to say that the evidence is very clear and distinct as to the alleged immoral act. Under the evidence of the witness, the jury could well have found that there was no such wrong committed, and that Wiley Rush, Sr., had another and perfectly legal motive.

There is no finding in the verdict that Wiley Rush, Sr., destroyed his deed, or even suppressed it, nor is there any resulting trust, because the jury have found that the defendant McPherson purchased the land as the agent of Rush and assigned his bid to him, and the commissioner conveyed to him. This rebuts the idea of a resulting trust in favor of McPherson. It appears from the findings that Rush, and not McPherson, was to be the owner of the land under a contract or agreement between them to that effect. It is not simply the case where one buys and takes the title in his own name, while another pays the money, with no contract in regard to the title or ownership of the land. Here there was an express trust, and by it the beneficial, as well as the legal interest, was to vest in Rush. *Kelly v. McNeill*, 118 N. C., 349; *Owens v. Williams*, 137 N. C., 165; *Sykes v. Boone*, 132 N. C., 199; *Avery v. Stewart,* 136 N. C., 436; *Davis v. Kerr,* 141 N. C., 11.

The plaintiffs not only show the express contract of McPherson to act as agent and buy and hold for Rush, but there is ample evidence of their and their ancestor's possession for many years, from 1891 to 1915, and no claim by McPherson during that long period, and surely no assertion of his right by action. And again, he did not get his deed from the commissioner until fourteen years after the sale. The judge, in the decree, has provided for the reimbursement of McPherson, and this is sufficient.

It is said by *Justice Reade* in *Cohn v. Chapman*, 62 N. C., 92, and so held by the Court, that "A parol agreement between A. and B. that A. will purchase land for B. and take the title to himself and hold it for B. until the latter can pay for it, and when paid for will convey it to him, is such an agreement as equity will enforce. And such, substantially, is the agreement in this case," citing *Lyon v. Chrisman*, 22 N. C.,

268; *Hargrave v. King,* 40 N. C., 430; *Cloninger v. Summit,* 55 N. C., 513. See, also, *Harrison v. Emory,* 85 N. C., 161; *Boyd v. Hawkins,* 37 N. C., 304; *Williams v. Avery,* 131 N. C., 188.

There was evidence that in fact Rush did pay the purchase money, but that is immaterial in view of what has been said; but we should call especial attention to the doctrine in this State, as expressed in *Mulholland v. York,* 82 N. C., 510, where it was held that where one purchases at an execution sale, under a parol agreement, that he will hold the land for another and convey to him upon repayment of the purchase money, a trust is created between the parties which will be enforced in a court administering equitable principles, and the purchaser at the sale will be decreed to perform his promise and convey to the other party on payment of the purchase money, although he has since purchased the same property at a bankrupt sale himself, and *Chief Justice Smith* very pertinently and significantly inquired: "Can a trust attaching to land be created by a parol contract entered into between the debtor and his attorney, that the latter will buy the debtor's land at the execution sale, hold for his benefit, and reconvey on being reimbursed the money paid for it?" He thus answers his own question: "In our opinion, a trust may be thus formed, and it will be enforced on the ground of fraud in the purchaser in obtaining the property of another under a promise to allow him to redeem, and attempting afterwards to appropriate it to his own use. The principle is illustrated in several cases in our own Reports, which will be briefly adverted to," citing *Turner v. King,* 37 N. C., 132, where *Judge Daniel* said: "The attempt of the defendant to set up an irredeemable title after the agreement he entered into is such a fraud as this Court will relieve against."

If the defendant McPherson had not made the promise to act as his agent and buy the land for Rush, the latter would in all probability have arranged to be present and buy for himself. An agent cannot thus unfaithfully deal with his principle by lulling him into security and inducing him to act upon his plighted word, and then avail himself of the breach of his promise by setting up the statute of frauds as a defense. "The statute," said this Court by *Chief Justice Pearson,* "was passed to prevent fraud, and not to encourage it." *Threadgill v. McLendon,* 76 N. C., 24. It does not apply to such trusts. The defendant McPherson had agreed to assume a confidential relation towards the plaintiff's ancestor, as his agent, to buy the property, and the law will not allow him to abuse it by buying the property himself in repudiation of his trust, thus deceiving and misleading his principle. We cannot follow precedents in other jurisdictions where their statutes may be different. Our rulings we think are more in harmony with just, correct and equitable principles. We add a few very direct authorities to those

already cited: *Barnard v. Hawks,* 111 N. C., 338; *Avery v. Stewart,* 136 N. C., 426; *Sandlin v. Kearney,* 154 N. C., 596; *Hargrave v. King,* 40 N. C., 436; *Cheek v. Watson,* 85 N. C., 198.

In *Barnard v. Hawks, supra, Shepherd, C. J.,* who we know had a clear conception of the law of trusts, and who always enlightened us when he wrote upon the subject, states the doctrine thus: "Even had this been land, and defendants had paid the purchase money and taken the title under a parol agreement to hold it for the plaintiff, subject to his right to repay the purchase money, the court, upon sufficient testimony, would have declared them trustees. This was substantially decided in *Cohn v. Chapman,* 62 N. C., 92 (93 Am. Dec., 600), in which it was held, upon the principle of trust, that such an agreement was not within the statute of frauds."

This Court said in *Avery v. Stewart, supra,* at p. 440, 441: "If the plaintiff had known that defendant intended to betray him by a false promise, and thus to deceive him into the adoption of a course of action which otherwise he would not have taken, he would not have placed any trust in the defendant, but would have arranged with some other and more reliable person in order to secure the same benefit. To permit the defendant to profit by such a betrayal of confidence so implicitly reposed in him would be not only inequitable, but a reproach to the administration of justice," citing *Johnson v. Hauser,* 88 N. C., 388; *Shields v. Whitaker,* 82 N. C., 516; *Thompson v. Newlin,* 28 N. C., 338 (42 Am. Dec., 169); *Cook v. Redman,* 37 N. C., at p. 623; *Cobb v. Edwards,* 117 N. C., 244; *Williams v. Avery,* 131 N. C., 188.

The same doctrine was substantially declared in *Cheek v. Watson, supra,* where *Chief Justice Smith,* after stating that where a purchase is made at a sale under a former promise that it shall be for another, who relies upon the promise and does not attend the sale and bid for himself, a trust arises not affected by the statute of frauds, says: "The trust would equally arise where the party relying upon the assurance is prevented from making arrangements with others by which he could have secured the same benefits promised by the purchaser."

To every one who has deliberately undertaken to act as an agent for another, his *trust* should be a sacred charge, not to be regarded with a covetous eye, but with unselfish fidelity to him for whom he has agreed to act. *McLeod v. Bullard,* 84 N. C., 515.

We have discussed the material questions and conclude that there was no error at the trial.

No error.

J. A. DAVIDSON v. DIAMOND FURNITURE COMPANY.

(Filed 4 December, 1918.)

Sales — Personal Property — Payment—Title—Conditions Precedent—Lumber—Measurement by Purchaser—Claim and Delivery.

Where the sale of personal property is agreed upon, without mention as to the time of payment of the price, the law will presume a cash payment by the purchaser at the time of its delivery; and where the contract was for the sale of lumber, to be measured by the purchaser, upon delivery, to ascertain the amount of the purchase price upon a rate agreed upon, the title does not pass to him until such measurement has been made, as a condition precedent; and when he fails to measure the lumber, and refuses payment therefor, claim and delivery will lie against him.

ACTION, tried before *Long, J.*, and a jury, at July Term, 1918, of IREDELL.

This action was brought (with claim and delivery) for a lot of lumber. Plaintiff contracted to sell the defendant a lot of poplar lumber at $21 per thousand, delivered, subject to the measurement of the defendant. There was nothing said as to when the payment was to be made. The defendant hurried plaintiff to get the lumber to its plant. Snow was on the ground and the weather bad, but plaintiff got out the car of lumber and delivered it on defendant's yard ready for measurement and payment. Plaintiff went over to the plant, as soon as the lumber got in, for his pay. It had not been measured and he was informed by Mr. Thomas that he would have it measured next day. Plaintiff returned next day and still the lumber had not been measured. Plaintiff demanded his money and was told that defendant didn't have it. He then demanded his lumber, but this demand was also refused, and he was told that the directors of defendant had ordered Thomas not to pay out any funds.

The defendant requested the court to instruct the jury that, if they believed the evidence, they should answer the issue "No," which was refused, and defendant excepted.

The court submitted the following issue: "Is the plaintiff the owner and entitled to the possession of the lumber described in the complaint?" which the jury answered "Yes."

The court charged the jury as follows: "If there was an unconditional sale of the lumber by Davidson and actual delivery of it to defendant, and there was no condition precedent or other acts on the part of the defendant other than taking it off the car, then the plaintiff would not be entitled to recover of this property. But if there was a contract made by this plaintiff with this defendant for a carload of lumber, and one of the elements of this contract was that this defend-

ant agreed that when the lumber was delivered at its premises that it would measure the lumber in order to ascertain how much it was to pay at the rate of $21 per thousand, and you find that Davidson on two several occasions gave the defendant an opportunity to measure it, or its agent, and the agent declined to measure it—didn't do it—this is a breach of the contract, and, under these circumstances, if you so find Davidson had the right to demand the lumber instead of the purchase price of it. If you find those to be the facts, then you will answer this issue 'Yes.' If you are so satisfied by the greater weight of the evidence you will answer this issue 'Yes.' If the plaintiff had not so satisfied you, and by the greater weight, you will answer the issue 'No.'"

Judgment was entered upon the verdict, and defendant appealed.

H. P. Grier for plaintiff.
Dorman Thompson for defendant.

WALKER, J., after stating the case: The case shows that plaintiff contracted to sell the lumber upon the condition that it should be delivered to the defendant, for the purpose of being measured to ascertain the price, at $21 per thousand feet, delivered. The clear intention of the parties as gathered from the undisputed testimony was that defendant should receive the lumber, measure it, and pay the price. The delivery was made to it at its mill, not for the purpose of passing the title, but in order that defendant could ascertain the price to be paid, and pay it, when the title should pass to it, and not before. Both parties agree that nothing was said as to the time of payment by the defendant, but the law in such a case is thus stated by Mechem on Sales, sec. 540: "It is well settled by abundant authority that in a contract for the sale of personal property, nothing being said as to the time of payment, the price must be paid either before or concurrent with the passing of the title." And precisely to the same effect is *Hughes v. Knott,* 138 N. C., at p. 110.

It is said in 35 Cyc., 283 (cited in *Elliott v. R. R.,* 155 N. C., at p. 238): "As a general rule, where there is a contract for the sale of specific goods which are in a deliverable state, but it is necessary to weigh, measure, test, or do some other act with reference thereto, for the purpose of ascertaining the price to be paid, the property in the goods, unless a contrary intention appears, does not pass until such act is done, and this rule is particularly applicable where the goods are to be paid for when delivered."

This Court held in *Millhiser v. Erdman,* 98 N. C., 292, that "Where a vendor shipped goods to a vendee under a contract in which it was stipulated that the latter should at the same time execute and send the

former his notes for the purchase price, but the vendee, having received the goods, failed to carry out the agreement with reference to the notes, it was held: (1) That the execution and delivery of the notes was an essential part of the contract, and no title passed until it was performed. . . . (2) That an assignment of goods to a trustee for the benefit of creditors does not pass the title as against the original vendor, and he may recover possession." And substantially the same was decided in *Frech v. Lewis*, 218 Pa. St., 141, where it is said: "Where a contract for the sale of goods provides for payment of the purchase price on delivery of the article sold, and the seller delivers the goods, but the buyer fails to pay, the right of property does not pass to the buyer with possession, but remains with the seller, who may at his option reclaim the goods."

This Court held in *Hughes v. Knott*, 138 N. C., at p. 110 (quoting with approval Benjamin on Sales, sec. 318): "When the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered in the possession of the buyer." See same case (second appeal), 140 N. C., 550.

With these principles, which have been settled by the authorities, before us we hold that the title to the lumber had not passed to the defendant. It is manifest, we think, that it was really intended by the parties that the lumber should be measured by the defendant to ascertain the price which should then be paid, and it was not their agreement that the title should pass before this was done. The price could not be paid before it was ascertained. The delivery was not made to the defendant to pass the title, but to enable him to measure the lumber. It was a special, and not a general delivery, or, in other words, the lumber was delivered to the defendant upon the condition that he would measure it and pay the price when it was thus ascertained. He agreed to measure, and when plaintiff persistently called upon him for the price he not only refused to pay it, but also refused even to measure the lumber or to deliver it back to the plaintiff. The conduct of the defendant, to say the least of it, was not frank, and certainly not creditable. It seems that its officer, or agent, had been instructed not to pay for the lumber, and it all has the appearance of a case where defendant purchased the lumber not intending to pay for it, and when it was in an insolvent condition, which would be fraudulent, if true, and plaintiff could reclaim his property. Or, to put it more mildly, the minds of the parties did not meet and agree upon one and the same thing at the same time, for plaintiff intended to sell upon payment of the price and defendant to buy without paying the price. But disregarding this feature

of the case, the defendant, as the jury found under the judge's charge, by refusing to comply with the condition upon which he received the lumber was not vested with the property in the lumber, which remained in the plaintiff. The title did not pass. The plaintiff testified that he did not deliver the lumber to the defendant for any purpose except to measure and pay for it.

It was held in *Grandy v. McCreese,* 47 N. C., 142: "The legal effect of it was to bind the parties to the performance of concurrent acts. . . . Neither party could demand performance by the other without the allegation and proof of his own readiness and ability to perform his part of the agreement."

If the defendant, when he received the lumber, was ready to perform, he did not do so, and because of his breach of the contract he did not acquire the title. Under a proper charge, the jury have found that defendant did not comply with the contract and could not retain the lumber.

The defendant was not entitled to a nonsuit upon the evidence, or to the instruction he asked to be given to the jury.

No error.

H. L. HILL ET AL. v. LENOIR COUNTY ET AL.

(Filed 4 December, 1918.)

1. Taxation — Ballots — Antagonistic Propositions — Schools—Townships—Statutes.

Where statutory authority is given to a county to submit to its voters the question of levying a tax to supplement its county school funds, and provision is made that, upon a favorable vote, the tax shall be levied and collected in the same manner and at the same time as other taxes of the county are levied and collected, with further like provision as to the townships therein; and it is further provided that should the county vote against the tax, an election may be held at any time thereafter in any township that has failed to vote for the tax: *Held,* the provisions as to the county and township in relation to the tax, for the purpose authorized, are twofold and antagonistic, the one for the county tax and the other for the township tax, depriving the voter of his right to choose between the two propositions if submitted upon a single ballot; and where this has been done, and the county at large has voted against the proposition, it may not be declared as carried as to a township therein which has cast a majority of its votes in its favor at the same election and upon the single ballot.

2. Same—Interpretation of Statutes.

A legislative act which authorizes an election to be held upon the question of levying a tax to supplement its county school fund, providing that

if any of its townships should cast a majority of its votes in its favor it should apply only to the township, should the county as a whole reject the proposition, requiring but a single ballot upon the two propositions, is contrary to public policy and to our Constitution, Art. VII, sec. 7, and void.

3. Constitutional Law—Taxation—Schools—Necessary Expense.

The levying of a tax to supplement the school funds of a county or township is not for a necessary expense, and requires the submission of the question to the voters of the district. Constitution, Art. VII, sec. 7.

4. Courts—Constitutional Law—Statutes—Taxation—Schools.

An act of the Legislature will not be declared unconstitutional by the courts when its validity may be upheld by a reasonable interpretation of its terms; and chapter 71, Laws 1911, authorizing an election to be held by the County of Lenoir to determine upon a tax to supplement the school funds, and to apply to townships voting in its favor, should the proposition be rejected by the county at large, is construed to require the propositions to be submitted upon separate ballots, to ascertain the expression of the voters as to whether they desired it for the township if the county should vote against it, or *vice versa*.

5. Elections—Notice—Ballots—Taxation—Schools—Counties—Townships.

An election held under the provisions of chapter 71, Laws 1911, authorizing a township within a county to vote upon a tax to supplement its school funds, in the event the proposition were defeated in the county at large, wherein the notices of election only set forth the proposition as to the entire county, and merely referred to the statute, and was submitted upon a single ballot and defeated, only ascertained the will of the voters as to the entire county, and not of the voters of a township that had cast a majority vote in its favor, so that it would apply to that particular township alone.

6. Constitutional Law — Taxation — Discrimination — Schools — Counties—Townships.

A legislative act authorizing a township within a county to submit to its voters the question of imposing upon the township a tax to supplement its public school funds in the event the county should vote, as a county, against the proposition, the taxes to be levied and collected in the same manner and at the same time as other taxes of the county are levied and collected; and should the vote within the township be favorable, "the annual special local-tax levy, etc., may be reduced by an amount not exceeding the special levy under the act," etc. *Semble*, the effect of the statute would be to impose a tax upon one section in favor of another, which is prohibited by our Constitution, and to allow one section to impose a tax upon another to which it is not itself subjected, which is also prohibited.

BROWN and ALLEN, JJ., concurring, with opinion; CLARK, C. J., dissenting opinion.

ACTION, tried before *Daniels, J.*, 27 August, 1918, at chambers, upon a motion to continue an injunction.

On the first day of April, 1918, the Board of Education of Lenoir County presented its petition to the Board of Commissioners of that

county, asking the latter board "to order an election to be held in said county and to ascertain the will of the people, whether there shall be levied on all taxable property and polls of said county a special tax, the amount per year to be fixed by the Board of Education of Lenoir County, and such amount to be certified each year to the Board of Commissioners to be levied, not to exceed 30 cents on the $100 valuation of property and 90 cents on each poll to supplement the county school fund of said county."

Upon consideration of said petition, the Board of Commissioners of said county called an election in the following language: "It is now by the Board of County Commissioners ordered that an election be held in Lenoir County to ascertain the will of the people, whether there shall be levied on all taxable property and polls of said county a special tax, the amount of said levy upon property and polls to be fixed by the commissioners upon the request of the County Board of Education, the County Board of Education naming the said amount, not to exceed 30 cents on the $100 valuation on property and 90 cents on each poll, said amount to be derived therefrom to supplement the county school funds of said county."

A new registration was ordered, and notice of the election was given by posting the order, or the substance thereof, at the courthouse door and in each voting precinct in the county. No advertisement of either the election or the new registration required was published in any newspaper. Nothing was said about a township tax in either the petition or order for the election, but defendants contend that the fact that the petition stated that "This petition and request is made under and by virtue of chapter 71 of the Laws of 1911," and the statement in the order directing the election that "This order is made in compliance with chapter 71, Laws of 1911, and the said act is here referred to and its terms made a part hereof," was sufficient to constitute the election not only a vote for a county tax, but also upon a tax levy of similar amount in each township. But over against this contention is the statement in the petition and call that the purpose of the election was "To ascertain the will of the people, whether there shall be levied on all taxable property and polls of said county a special tax, . . . said amount to be derived therefrom to supplement the county school fund of said county."

The election was ordered. Notices are said to have been put up at the courthouse door and one notice in each township, but no publication was made in a newspaper, and the campaign proceeded in the usual manner.

The election was held on the 18th day of May, 1918, and notwithstanding the scant publicity given to the necessity of registration 1,728 persons registered, and thus qualified themselves to vote. Of this num-

ber 516 voted in favor of the tax, and although it was not necessary for those opposed to the tax to vote at all, having registered, 819 votes were cast against the tax. The majority of the registered vote against the tax was 1,209, and the majority of votes actually cast against the tax 303. Kinston Township voted for a tax to be used "to supplement the county school fund," and out of the 664 registered votes in that township 370 were cast in favor of the proposition to levy the tax upon all the property and polls of the county to supplement the school tax of the county, and of the registered vote in that township there was a small majority for the county tax. In nearly all of the other townships the proposition was heavily defeated, and in most of the townships the vote actually cast against the proposition greatly exceeded the vote cast in favor thereof, according to the tabulation of the vote contained in the record.

The votes were canvassed and the result declared and certified to the Board of Commissioners at the July meeting, and at this meeting that board declared that the proposition had been defeated as to the county, and that the tax and no part thereof should be levied upon the property of the county as a whole; but the board declared "that the special tax in Kinston Township was and is hereby declared to be carried," and it was proceeding, when restrained, to have levied and collected a tax in Kinston Township "in the same manner and at the same time as other taxes are levied and collected, the proceeds to be used to supplement the school fund of said township, as provided by law, not to exceed 30 cents on the $100 valuation, and not to exceed 90 cents on the poll in said township, the amount to be levied to be fixed each year by the County Board of Education and certified to this board and levied accordingly, as fully appears in the petition and order heretofore made by this board providing for said election under the requirements of the law."

The judge, at the hearing, refused to continue the injunction and dissolved the restraining order theretofore issued by *Judge Calvert,* and plaintiffs appealed.

Y. T. Ormond, Murray Allen, and James H. Pou for plaintiffs.

Rouse & Rouse, Cowper, Whitaker & Hamme, and G. G. Moore for defendants.

WALKER, J., after stating the case: The decision of the question presented to us by this record depends largely, if not altogether, upon the construction of the statute, it being chapter 71 of the Public Laws of 1911, and the validity of the election held thereunder. The act provides for an election in the county of Lenoir to ascertain the will of the people upon the question, whether taxes shall be levied "to supplement the

county school fund of said county," the same to be conducted under the same rules and regulations as prescribed for "district special school-tax elections" in section 4115 of the Revisal of 1905. It then further provides, in section 3, that if a majority of the qualified voters at the election thus held shall vote in favor of the tax, it shall be levied and collected in the same manner and at the same time as other taxes of the county are levied and collected. Similar provision is made in section 4, if a majority of the qualified voters of any township of the county shall vote for the special tax. In section 5 it is provided that "if a majority of the qualified voters at said election in any township or in the entire county shall vote for the tax, on petition, as therein set forth, the annual special local-tax levy of any special-tax district within the township or the county may be reduced by an amount not exceeding the special levy under the act for the county or township." And section 6 provides that where the county votes against the tax an election may be held at any time thereafter in any township that has failed to vote for the tax.

If the act of 1911, chapter 71, permitted the submission of the two-fold proposition, one for the county tax and one for the township tax, to be based upon a single ballot, such intention on the part of the Legislature is contrary to public policy and against the decisions of this Court.

In *Winston v. Bank,* 158 N. C., 512, it was said: "When a popular vote is required to authorize or validate a municipal indebtedness, the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded opportunity to express his preference or decision on a single ballot and on the question as an entirety, the election, as a rule, is invalid, and on objection made in apt time and in a proper way may be disregarded and set aside."

The same was recognized in an earlier decision of the Court. *Goforth v. Construction Co.,* 96 N. C., 538, in which *Justice Merrimon* says: "We do not deem it necessary at this time to decide what effect the taking of the vote upon the proposition to subscribe for stock of two distinct companies as a single proposition may have on the election, except to say that it was certainly irregular and improper to do so."

This statement of the law controlling elections is fully supported by the text-writers and the decisions of other courts. In 21 A. & E. Ency. of Law (2d Ed.), at p. 47, the writer says: "Two propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as voters might be thereby induced to vote for both propositions who would not have done so if the questions had been submitted singly."

In *Rea v. City of Lafayette,* 130 Ga., 771, the Supreme Court of Georgia holds that, "When several distinct and independent propositions for the issuing of bonds by a municipality are submitted to the qualified voters of a town or city, provision should be made for a separate vote upon each. They cannot lawfully be combined and submitted to the voters as a single question."

In the foregoing case the Georgia Court says: "No voter should be compelled, in order to support a measure which he favors, to vote also for a wholly different one which his judgment disapproves; or, in order to vote against the proposition which he desires to defeat, to vote also against the one which commends itself to the approval of his judgment. When he is thus compelled, if he votes at all, there is something closely akin to coercion when his ballot is cast."

The reasons upon which this principle is founded are stated by the Supreme Court of Iowa as follows: "The law, in our opinion, has provided no such mode of submitting these questions to the vote of the people. The evils which might be permitted to grow up under such system are so obvious and apparent that any extended discussion of the question by us would be superfluous. It may be sufficient to suggest that if it were allowed, measures in themselves odious and oppressive might by means of it become fastened upon a county which in no other way could have obtained the number of votes requisite to insure their adoption but by being connected with some other proposition which commended itself to the favor and suffrages of the people by its inherent merits and popularity. They must be adopted or rejected together. After the same manner, a measure desirable and necessary to a people of a county may, when offered for their adoption, be rejected by their votes and fail to become a law by reason of its connection with some other measure or measures unpopular and uncalled for. In either case there is an evil. An unpopular measure may be forced upon an unwilling people, or a necessary and desirable one may be denied them, in spite of their wishes. It is sufficient for us to say that the law, in our opinion, intended to provide for no such system of contradictions. A measure wise and salutary in itself needs no adventitious assistance to recommend it to the suffrages of the people or to insure its adoption by them. It may demand that its enactment into a law be made to depend upon its sanction alone. A pernicious measure is not entitled to such assistance, and should be permitted to stand or fall by its own inherent merits or defects." *McMillan v. Lee County,* 3 Iowa, 311, cited with approval in *Winston v. Bank, supra.*

Numerous decisions of the courts of other States holding invalid elections in which two separate propositions were submitted to a single vote of the people are collected and cited in the opinion of our Court

in *Winston v. Bank,* 158 N. C., at p. 516. Even if it should be conceded that two propositions can be submitted at a single election, if so directed by legislative enactment, certainly public policy would require that provision be made for casting a separate ballot on each proposition, unless otherwise directed by the Legislature, especially where the matter to be voted upon does not come within the class of necessary expenses. In no other way can the true will of the voters be determined and the purpose of the election be accomplished.

In *Lewis v. Comrs.,* 12 Kan., at p. 213, it is said: "It may be conceded that two or more questions may be submitted to a single election, provided each question may be voted on separately, so that each may stand on its merits. But that is a very different matter from tacking two questions together to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission."

It would be difficult to conceive a more glaring example of the harm resulting from the submission of two propositions to a single vote of the people than that arising under chapter 71, Laws of 1911. Voters desiring to supplement the county school fund by a special tax on the property of the entire county may be unwilling that the special tax should fall only on the property of the township in which they reside for the purpose of supplementing the school fund of said township, and, on the other hand, voters desiring the tax in their township may not desire that the levy be made county-wide. But under the act of 1911, every single voter who casts his vote in favor of the tax for the entire county, under the defendants' construction of the act, also votes for the tax for his township regardless of his attitude toward the question of levying the tax solely in the township in which he resides. The two propositions are so antagonistic that their submission at a single election and upon a single ballot is contrary to the Constitution, as we will show, to a sound public policy, and to the principle which should govern a fair election. If such double force could be given to a ballot, under the call for the election held 18th May, no such election actually was held. If it were the purpose of those who called that election to have a dual proposition, one for the county and one for the township, based upon a single ballot, it may well be doubted if sufficient legal notice of such purpose was given to the voters. In elections of this character great particularity should be required in the notice in order that the voters may be fully informed of the question they are called upon to decide. 15 Cyc., 325.

There is high authority for the principle that even where there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be stated in such manner as to enable them intelligently to express their opinion upon it, and for that purpose the

proposition should be submitted separate and distinct from any other proposition which is different from the question upon which a vote is desired or not germane to it. 2 Dillon on Municipal Corporations, sec. 891.

It will be noted upon a careful study of this statute that the real and single question submitted is, whether there shall be a county tax for the purpose therein specified, and there is no distinct and clear submission of the question whether there shall be a township tax. If it means that if in voting for a county tax it should happen that a majority of the voters in a township have voted for it, then there shall be a tax in that township if the county tax is defeated. This is obviously a denial of the right of the voter to cast a fair and untrammelled vote for the question of his choice, and the voters of the township by this declaration have not voted for a tax upon themselves, but, on the contrary, by voting so heavily in favor of the county tax, which, if carried, would have defeated the township tax, it is apparent that they intended to vote against a township tax, and yet the act declares, not logically, but constructively, if not arbitrarily, that they shall be considered as having voted for a township tax. We are of the opinion that this clearly violates the spirit and the letter of the Constitution, art. 7, sec. 7. That instrument provides in said section that no debt shall be contracted or tax levied for anything except necessary expenses unless previously authorized by a vote of a majority of the qualified voters in the county or township. What does this mean? The tax in question is not for necessary purposes or expenses, as we have held in *Hollowell v. Borden,* 148 N. C., 255, and *Smith v. School Trustees,* 141 N. C., 143, and therefore requires the sanction of a majority of the qualified voters before it can be levied. The section means that where it is not a necessary expense, as here, each voter shall be consulted at the polls and shall have a free and fair opportunity to express his will upon the particular question, or it means nothing, and was a vain and idle promise to him. If he is required to vote for a tax which he favors, under the penalty that in doing so he may be subjected to another which he does not favor, but which he may stoutly oppose, he surely has not had the vote which the Constitution guarantees to him, for he has been embarrassed, if not coerced, in casting his vote, and was not, therefore, a free elector.

When the people of the township voted for the county tax it was substantially a vote against the township tax, as if the vote for county tax had prevailed in the county there would have been no township tax. And again, the people of the township here had no opportunity to vote for a township tax for the reason that no such question has been submitted to them. The only proposition voted upon by them was that of a county tax, and they are now proposed to be taxed only in the town-

ship, and not in the county, because by mere construction they are held to have approved a township tax. The only just inference to be drawn from their vote is that they wanted the county tax and not the township tax.

This case is not like *Winston v. Bank*, 158 N. C., 512, for there the tax was for necessary expenses, such as street improvements, waterworks, sewerage, and other like purposes, and the Legislature had the right to require an election or not, at its discretion, and the same may be said with regard to *Lumberton v. Nuveen*, 144 N. C., 303; *Smith v. Belhaven*, 150 N. C., 156; *Briggs v. Raleigh*, 166 N. C., 149.

Commenting upon *Winston v. Bank, supra*, in *Taylor v. Greensboro*, 175 N. C., 423, 426, so recently decided, this Court thus distinguished it, and the passage quoted from it and approved in the *Taylor case* would seem to be decisively against the defendants upon the question now under consideration. The Court said in the *Taylor case*, where the validity of a dual question on a single ballot was raised: "The case of *Bank v. Winston*, 158 N. C., 512, presented a very different question from the one involved in this case. In that case it is held, 'When a popular vote is required to authorize or validate a municipal indebtedness the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded an opportunity to express his preference or decision on a single ballot and on the question as an entirety, the election, as a rule, is invalid, and on objection made in apt time and in a proper way may be disregarded and set aside.'"

The election in the *Winston case* being for the approval of a tax for necessary expenses, it was regulated by the Legislature, and not by the Constitution, while here as the proposed tax is for expenses, which we have held not to come within the class of necessaries, it is governed by the constitutional provision, which is mandatory, that there shall be an election at which, of course, the people shall be given a fair chance to vote on the particular measure. It would not be an election if such were not the case. They must not be compelled to vote for it, either directly or indirectly, and the Constitution most clearly implies that they shall not be unduly hampered in making their choice. The ballot in our case was solely for a county tax, and that is the only question submitted to a vote. The people have no chance to vote for a township tax as a separate and distinct proposal to impose that burden, not even the chance that a voter would have where there are two or more questions submitted on a single ballot, for there he who votes at all must necessarily vote on all the questions.

Judge David J. Brewer, for the Court, said in *Lewis v. Comrs.*, 12 Kan., 186: "It may be conceded that two or more questions may be

submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined and the real will of the people overslighted. By this combination an unpopular measure may be tacked on to one that is popular and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections that aims to secure freedom of choice not merely between parties, but also in respect to every office to be filled and every measure to be determined. A voter at a State election would be shocked to be told that because he voted for a person for governor named on one ticket he must vote for all other persons named thereon, or that voting for one person he was to be understood as voting for all. He would feel that his freedom of choice was infringed upon. None the less, it is so by such a submission as this." He also says: "A mode of submission which is so obviously unjust, so contrary to the spirit of election, and has received such condemnation from the courts, will not be imputed to be the intention of the Legislature unless necessarily demanded by the language used." Evidently in this passage he is referring to a proper construction of the statute and did not intend to concede that the Legislature had power to make such a submission if the language of the statute clearly permitted it. But this last clause has a direct and palpable bearing upon this case in one of its features.

We should not impute to the legislative act the intention to impair in the least the right of the people to have a free and distinct vote upon the question as to the township tax, and, therefore, the law of 1911 should be so construed within the rule stated by *Judge Brewer* as to require a ballot as to the county tax, and also one as to the township tax, for it is capable of such a construction. It will be observed upon reading the act that it provides, by sections 1, 2, and 3, for an election in the county for a county tax, and in section 4 that "in case a majority of the qualified voters at said election in any township shall vote for said special tax," etc. Surely it was not meant by these words that if the township voters shall vote for a county tax, it shall be considered as a vote for a township tax, or, in other words, if they have voted for one proposition they shall be considered as having voted for another and quite different and separate proposition upon which they had no chance to vote, and besides, the two were antagonistic in that if county tax carried there would be no township tax. The act itself treats them as separate and distinct questions, and provides, in substance, that a

vote for one—that is, the county tax—shall be taken as a vote against the other. The act should be so construed, under the principle heretofore stated, as requiring two ballots, one for the county tax and the other for the township tax, with a provision, which would be entirely constitutional, that a vote for the one, or county tax, shall annul or cancel the vote for the other. This would accord to the people their right under the Constitution to have a free vote and at the same time make adequate provision for a fair and constitutional election to raise the necessary taxes, and the very laudable purpose of aiding the public schools could just as easily be promoted or accomplished.

It has been settled by authority that proper implications may be made and reasonable inferences drawn for the purpose of sustaining an act of the Legislature (*Water Co. v. Water Co.*, 44 N. J. Eq., 427; *Lowery v. School Trustees,* 140 N. C., 33), and the act should be so construed, if possible, as to render it valid, rather than invalid. And it is also held that when a duty is imposed upon a public agency, the necessary implication arises that adequate power is given to do the thing in accordance with the Constitution and in the manner directed by that instrument. *Lowery v. School Trustees, supra.* It is, therefore, a proper deduction from these principles, that in this case we should so construe the act of 1911 as to conform it to the mandate of article 7, section 7, of the Constitution, by requiring both questions as to county and as to township tax to be submitted so that the people may have the chance, directly and actually, to vote upon each of those questions, and not be subjected to the imposition of a tax by construction of the vote, and when they have in fact voted for only one tax in the whole county, and by doing so have announced their clear intention to defeat the other tax. This method of voting is squarely against the constitutional requirement that there shall be a vote upon each and every proposition to tax the people—a free and unconstrained vote—a real vote, and not one by forced construction of the result.

It is said by the authorities that the question should be submitted in such manner as to enable the voters to intelligently express their opinion upon it, and for that purpose it should be submitted separate and distinct from any other proposition which is different from it or not germane to it. 15 Cyc., 325; 2 Dillon on Mun. Corp., sec. 891. The two propositions here must be distinct, under this principle, when a prevailing vote for one will destroy the other.

It was said in *O'Neill Eng. Co. v. Town of Ryan*, 124 Pac., 19: "To obtain the authority of the qualified voters to incur an indebtedness, or to enter into a contract otherwise prohibited, the proposition must be submitted to them in such specific language as to apprise the voters of

the full purpose and the exact and particular thing upon which they are called upon to vote and decide."

The framers of our Constitution were not concerned so much about the method or procedure of voting as that the right to the free exercise of the privilege of voting, where a vote was required, should be preserved unimpaired and safeguarded, but this they did provide for by the clearest implication, for the right to vote would be worthless without it.

The question of a township tax was not submitted, but the only one voted on was a county tax, and the voters are told that the more they voted and struggled to defeat a tax on the township by voting for the county tax the more they voted for that which they earnestly endeavored to defeat. This is somewhat of a paradox. In this respect, the case is dissimilar to any heretofore decided, as it presents quite a different question from those upon which the other decisions were rendered. If we should hold to be valid this method of voting for one thing and declaring the result to be in favor of another which does not follow logically from a decision of the first, and where the two questions are not so naturally related and linked together that the voter can be conclusively presumed to have voted on both, as in *Keith v. Lockhart,* 171 N. C., 451, we will otherwise have gone a long way toward allowing voters to be coerced in elections, and, too, it would be a very dangerous stride we are making toward an undesirable goal. The voter cannot be kept too free in the exercise of this important constitutional franchise. Even where the Legislature has the conceded power to act, as in the *Winston case,* where the expenses were necessary and the improvements local, it should be careful to see that the voter, who must pay the tax—perhaps a great burden to him in his poverty—is left perfectly free to vote as he will. We are satisfied that the Legislature meant in this instance to follow the salutary rule and to allow the people to vote separately upon the two propositions. We will add in regard to the *Winston case* that the Court only decided that the election did not conform to the statute under which it was held and the submission of the question on one ballot was not warranted by it.

There is another question in the case: the practicability of executing that part of the statute which relates to the disposition of the fund realized from the taxation. This is a very serious matter and worthy of our careful consideration. It is at least not clear to us how it can be done so as not to impose a tax upon one section in favor of another. We have held that this cannot be done. *Comrs. v. State Treasurer,* 174 N. C., 141. We need not pursue further the discussion of this question as our conclusion upon the other one is sufficient to dispose of the case.

We regard this as one of the most important questions which this

Court has been called upon to decide, involving, as it does, the right of the people to say by a distinct and unequivocal vote when they shall be taxed. The statute submitting the question should not be ambiguous, and the constitutional right of voting upon the measure should not be hampered or clogged in any way. We are not dealing with the construction of a legislative grant conferring the right to vote when the Constitution does not interfere and the Legislature itself prescribes the method, but with the sacred and inviolable right of the citizen under the Constitution itself to be heard at the ballot box, with a fair chance to express his choice upon the question whether or not he shall be taxed, which right is among the most important and valuable of those guaranteed by that instrument.

The glaring fault of the statute and its very dangerous tendency is found in section 5, which encourages a voter in a school district to vote for the county tax upon the promise held out that if it carried nothing shall be added to the tax in his district. Besides the objection that this appeals to his selfishness, the voter is thus allowed to impose a tax on others which cannot be imposed on himself. It may well be doubted if this kind of taxation is permissible under our Constitution. It is certainly wrong in principle and violates the rule of uniformity by taxing some and exempting others, the county tax and the school district tax being two separate and distinct forms of taxation. The question is not whether it appears that the township would have voted against the tax, but whether the voters in the township have had a fair opportunity to declare themselves upon the question of tax or no tax. Nor is it a question as to whether school facilities should be enlarged or extended, for that is a question of public policy and not one of law. Everybody, we presume, believes in general education and desires to extend as much aid as possible within the Constitution and the ability of the taxpayers to contribute to that most worthy cause, but whether this shall be done, as before said, is a question of policy and is administrative in its nature.

The ruling of the court below was erroneous, and is reversed, and the injunction will issue as prayed for in the complaint.

Reversed.

BROWN, J., concurring: I concur fully in the opinion of the Court by *Justice Walker* and in the concurring opinion of *Justice Allen*.

No member of this Court has ever permitted a legal technicality to stand in the way of public education. On the contrary, they have done all in their power to foster it, consistent with their oaths to support the Constitution, the paramount law of the State.

Article 9 of that instrument declares that "religion, morality, and knowledge, being necessary to good government and the happiness of

mankind, schools and the means of education shall forever be encouraged." The same article enjoined upon the General Assembly the duty of providing four-months public schools.

In construing that article in a notable case, this Court unanimously declared that it was never intended that the limitation upon taxation in articles 5 and 7 should thwart the provisions of article 9, providing for four-months free public schools. This decision unshackled the Legislature in dealing with them. *Collie v. Comrs.*, 145 N. C., 172. In rendering that decision, we were compelled to overrule two long standing decisions rendered by some of the ablest judges this State ever had.

While we are glad to advance the cause of education in any legitimate way, we cannot strike down other plain provisions of the Constitution intended for the just protection of the taxpayer and voter.

In construing article 7, section 7, of the Constitution, this Court, with unanimity, has declared in numerous cases that no special tax for school purposes can be levied by any county, city or town unless the proposition is submitted to and carried by a majority of the qualified voters. Connor & Cheshire on Const., p. 320.

The statute under review provides for an election to determine whether a special county-wide school tax shall be levied. It further provides, in substance, that if the county tax fails to carry, that the tax shall be levied in any township wherein a majority of the qualified vote is cast for the county-wide tax. No election was ordered or held to determine whether a township tax should be levied, but the voter who votes for a county-wide tax is legislatively presumed to have voted for a township tax. This is an unwarranted presumption, for many voters may have favored a county tax who were against a township tax. Thus the voter who desires a special tax levy by the county, but opposes it as a township levy exclusively, is constrained against his will to vote for the proposition to get any special tax whatever. If the county tax fails to carry, then the very thing he is opposed to comes to pass. But another fatal and insuperable omission is to be found. The act fails to provide any means whatever by which a voter who is opposed to a county tax, but favors the township tax, can register his will at the polls. If he desires to vote his convictions he cannot vote at all. One of the elemental principles of a legal election is that every voter must be afforded the opportunity of recording his vote on either side of the proposition. The statute fails in this respect.

I am aware that elections have been held under this statute in several counties. In my own native county of Beaufort an election was held to levy a county-wide special tax, and I made a special trip to my home to have the pleasure of voting for it. It is true that there was no complication in those counties, and the tax was levied, but that was because

the tax received the approval of the majority of the qualified voters of the county.

In Lenoir County a large majority voted against the tax as a county proposition, and only Kinston Township voted for it. But the voters of that township who favored a county tax, but were against an exclusive township tax, had their votes legislatively construed into favoring the latter, while those who opposed a county tax and favored a township tax had no opportunity to vote their real convictions.

ALLEN, J., concurring: There are, I think, two insuperable objections to an affirmance of the judgment:

(1) There was no opportunity given for the fair expression of the will of the voter. This question is fully covered in the clear and learned opinion of *Justice Walker,* and I do not care to do more than add one or two suggestions to what he has so well said. There was one ballot to be voted at the election, and that was for or against a *county tax.* A majority of the votes was against a county tax, and because a majority of the voters in Kinston Township was in favor of the *county tax,* this by legislative construction, is to be held a vote for a township tax. This method of submitting a question to the people is coercive, is calculated to mislead the voter, and does not tend to an open, honest and intelligent expression of the popular will. A voter who was in favor of a county tax and against a township tax could not record his opposition to a township tax without voting against his convictions by voting against a county tax, nor did a voter in favor of a township tax and against a county tax have any opportunity to vote, and the fact that near four hundred of the registered voters did not vote at all indicates that many belonged to one or other of these classes. Again, a mischievous and dangerous section of the act, under which the election was held, is section 5, which reads as follows: "That in case a majority of the qualified voters at said election in any township or in the entire county shall vote in favor of said special tax, on petition of a majority of the members of the board of trustees of the school committee of any existing special-tax district within said township or county so voting, the county commissioners shall reduce the annual special local-tax levy of said district by an amount not exceeding the special levy provided for the county or township under this act." This gave the opportunity to the voter of a school district having a special tax to cast their solid vote in favor of a tax on the rest of the county, with the absolute knowledge that they were not increasing taxes on themselves one cent because, immediately upon the county tax being voted, they could have this special tax decreased proportionately.

(2) The proposed tax is violative of the principle of uniformity of taxation required by the Constitution.

The tax which it is proposed to levy is on the property and polls of Kinston Township, but the school districts, which will receive the benefit of the tax, are not coterminous with the township lines. One district is within the township, another is composed of parts of Kinston and Vance townships, and still another has in it parts of Kinston, Falling Creek, Neuse and Southwest townships. The children of Vance, Falling Creek, Neuse and Southwest townships will have the right to attend the schools of their respective districts without charge, and they cannot be required to pay any part of the tax, because this can only be levied in Kinston Township, and this seems to me clearly in opposition to the principle that one section cannot be taxed for the benefit of another.

"The principle of uniformity in taxation forbids the imposition of a tax on one municipality or part of a State for the purpose of benefiting or raising money for another." *Faison v. Comrs.,* 171 N. C., 415, approved in *Hood v. Sutton,* 175 N. C., 100.

CLARK, C. J., dissenting: The election was held by virtue of chapter 71, Laws 1911, and there is no suggestion of any irregularity in the petition or order for election, or the advertisement thereunder, nor that the election was not in all respects fair and the propositions submitted were not fully understood.

Section 4 of the act provides that "if a majority at said election in any township of said county" shall vote in favor of the tax to supplement the school funds it shall be levied and collected to supplement the school funds of said township. It is not denied that a majority of the registered vote in said township was cast in favor of the measure. No one can question that they voted to tax Kinston Township for better schools if the measure failed for the county. It is immaterial, therefore, that those voting for said tax for township purposes also voted to extend the measure to the county, which latter measure failed to carry. The statute expressly provides that in such case the measure shall be valid for the township.

There is no proof that any voter voted for the township measure only because he was in favor of the county tax. On the contrary, it is more probable that some voted against the township tax because they were not in favor of the tax being extended to the entire county, for the taxable values in Kinston Township in proportion to the children therein is much greater than in the county at large, and the county measure would have had more probably the effect to deter some from voting for the township tax. However, that is merely a surmise, and there is abso-

lutely no proof that any voter for the township tax was influenced either way. However that may be, the manner of submitting the measure was entirely within the discretion of the Legislature. There is no provision in the Constitution which forbids the measure to be submitted as the Legislature provided, nor which confers upon the Court the right to set it aside because it may doubt the wisdom of submitting the measure in that form.

The only other objection upon which an injunction is asked against putting in force the measure adopted by the township, under the authority of the legislative act, is that a few children in the adjoining townships may participate in the benefit of the Kinston Graded School. There is nothing in our Constitution or our laws which invalidates the result of an election in which the people of a township have voted to tax themselves for the benefit of the public schools of the township because a few children from outside may attend and be benefited by the few weeks longer term. Kinston, like all other towns, is dependent for its prosperity upon the adjacent country, and if the children of such tributary territory shall receive a little added education it does not invalidate the election and will not injure Kinston. At the most, the injunction would lie, not to set aside the election, but to prohibit those children from attending the graded school for the few additional days—if any man in Kinston can be found to sue out proceedings for that purpose.

The public policy of our State is prescribed by the General Assembly. It is not for the courts to say whether a measure adopted by the General Assembly is the wisest or best in the judgment of the Court; that is a matter for the people acting through their representatives in the General Assembly. When there has been a compliance with the provisions of the statute, and there is, as in this case, no express provision of the Constitution forbidding such action, the question of its wisdom or the soundness of the public policy is not for consideration by the courts.

Ninety years ago this State, under the leadership of Judge A. D. Murphy and William A. Graham, began the policy of establishing public schools for the education of that large part of our people who were not able to send their children to private schools. Against the persistent opposition of those who were unwilling to be taxed "for the benefit of other people's children," as they styled it, the schools made slow headway. The Constitution of 1868 took a step forward by requiring a "four-months school" term, but the requirement was not fully carried out in the face of the reactionary opposition. A few years ago, under the leadership of Alderman, Aycock, Joyner, and McIver, more progressive legislation was enacted, most especially in favor of allowing

townships and other localities to vote additional taxes for better education. Under one of these acts the present election was held, and it would seem that technical objection should not be allowed to vitiate the will of the people of Kinston Township duly and regularly expressed at the ballot box.

Notwithstanding all that has been done by the friends of education, North Carolina and New Mexico stand at the foot of the list of forty-eight States in the percentage of illiteracy and in the shortness of school terms. That this does not command the approval of our people who are more progressive is shown by the fact that in the recent election, by more than one hundred thousand majority, an amendment to the Constitution was ratified to require "six-months schooling" for the children of the State.

The public policy of the State as declared by the people through their Legislature has always been more abreast with the spirit of the age than the opposition will admit. The Legislature has adopted prohibition and measures for better schools with longer terms, for good roads, for stock laws, for drainage and other progressive measures. At every step each of these measures has been met with objections from those who are opposed to modern methods and to the more general extension of the benefits of government to all the people. Whether this shall be done or not is a matter for the people themselves, who can express their wishes only through their chosen representatives in the law-making branch of the government.

The people of Kinston Township having by the requisite vote at an election held under the provisions of an act of the Legislature voted to tax themselves to lengthen their school terms and to extend their school facilities, it would seem that the courts ought not to interfere by injunction and forbid them to do so upon the allegation, without any proof possible, that a majority of the vote would not have been in favor of township taxation, if the Legislature had seen fit to provide that the proposition for county aid should be submitted on a separate ticket. Whether this should have been done or not was a matter for the Legislature, and not for the judgment of the courts. Nor should the fact that a few children outside of Kinston might enjoy the benefit of a few days extra schooling by paying for it—which is already the case in Raleigh, Charlotte, and probably every other town in the State—be held so vital a defect as to defeat the additional education which the people of Kinston have voted to tax themselves to give to their own children. If the additional education to the few children from outside the township who may attend the Kinston school is a serious wrong, even if they pay for it (of which Kinston should be relieved), this can be righted by an injunction against such children attending beyond the

time which they would have attended but for this extension—rather by setting aside and invalidating the benefits of the measure which the people of Kinston Township have voted for their own children attending their school.

This is a "government of the people, for the people and by the people," and when the people of Kinston, with their usual intelligence, have voted to tax themselves for longer school terms it is because they have deemed it wise and to their best interests. Of this they are the best judges. Their action should not be set aside because some other manner of submitting the question may be deemed more ideally and logically perfect.

The Constitution is a plain, practical instrument drawn up by the men who sat in the Convention of 1868, with some amendments since. It has no cryptic, occult or esoteric meaning. It was intended to be easily understood by all men. There is nothing to be found in it which forbids the Legislature to submit this proposition to the voters exactly in the terms in which it was submitted in this statute, nor is there any doubt that the intelligent voters of Kinston Township understood the meaning of the act, and that they voted according to their wishes. Under the authority of the statute they have cast their ballots for better schools for their children and longer terms, and this expression of their will should not be lightly set aside. If there is a constitutional provision which the Legislature and the people of that township have violated it has not been pointed out.

The manner of submitting the vote so as to apply to the county, or to one or more townships, as the popular will may determine, has been sustained in almost exactly similar cases by *Hoke, J.*, in *Keith v. Lockhart,* 171 N. C., 451, and by *Brown, J.*, in *Briggs v. Raleigh*, 166 N. C., 149, and cases therein cited. The fact that eighteen or twenty children in adjoining townships might enjoy the benefit of the longer term in Kinston Township cannot only be met by the parents of such children arranging to pay for the extra time, as is already done in several cases, but the township and the school district can be made coterminous by the County Board of Education, which can change the lines of the district at any time. Indeed this objection scarcely needs serious consideration.

Chapter 71, Laws 1911, under which this election was held, is not a local act recently passed for the benefit of Lenoir County, but it is a State-wide optional statute adopted nearly eight years ago, under which Wilson, New Hanover, and Beaufort, and probably other counties, and in Washington County the township of Plymouth, and townships in other counties have increased the length of their school term in accordance with an ever-growing public opinion in that direction. Section 5 thereof

has no sinister or mischievous purpose. It simply provides that any unit, whether county or township, adopting the increased appropriation for its public schools may subsequently reduce the amount back to not less than the original sum by application of the board of trustees or school committee thereof to the county commissioners to abate said special tax. The object of this is simply that if it is found that the special tax provides more funds than is required for any year, no more of it shall be collected than is found to be necessary. This is wise and businesslike, not mischievous, and cannot possibly affect or concern any one except the county or township which, on its own application, is thus permitted by the county commissioners to reduce the special tax it has voted for its schools.

H. C. SHERRILL v. AMERICAN TRUST COMPANY.

(Filed 27 November, 1918.)

1. Banks and Banking — Bills and Notes — Ultra Vires Acts — Statutes— Inland Bills—Drafts—Negotiable Instruments.

Where a draft drawn to the maker's order and, having been endorsed by another, is accepted at a bank, and then purchased, in due course, before maturity, by an innocent purchaser for value, the bank may not resist payment upon the ground that the transaction was *ultra vires*, and not within the authority of its charter, authorizing it to accept bills, notes, commercial paper, etc., for it comes within the statutory definition of an inland bill of exchange, Revisal, secs. 2276, 2279, and may be treated as a bill or note, at the option of the holder.

2. Banks and Banking—Bills and Notes—Ultra Vires Acts—Due Course.

The purchase by a bank of a draft drawn to the maker's order and endorsed by another is not foreign to the purposes of its charter authorizing it to accept bills, notes and other negotiable paper, conceding it not to be within the powers expressly conferred, and the bank is liable thereon to its innocent purchaser for value.

3. Banks and Banking—Bills and Notes—Ultra Vires Acts—Consideration— Retained—Due Course—Innocent Purchaser.

The defense of *ultra vires* by a bank to its liability upon a draft payable to the maker's order, sold to an innocent third person for value, where the bank has retained the purchase money, without offer to restore it, is untenable, there being nothing in the transaction that is either illegal or against public policy.

APPEAL by defendant from *Harding, J.*, at the October Term, 1918, of MECKLENBURG.

This is an action to recover of the defendant bank on two drafts. The facts are as follows: I. C. Lowe drew a draft, payable to his own

order in ten days, addressed to Walter Lambeth, which the latter accepted. Lowe then endorsed this draft in blank to the bank, and the bank discounted it, advancing to Lowe the money thereon. Lowe at the same time drew a similar draft, except addressed to the bank, also endorsed in blank by Lowe, and the bank accepted this draft, discounted it, and advanced to Lowe the money thereon. Both of these instruments were subsequently endorsed and assigned by the bank to the plaintiff, a purchaser for value in due course and without notice of any defects other than such notice, if any, as may be charged to him by the terms of the bank's charter and the laws of this State. When demand was made on the bank for payment, payment was refused on the alleged ground that neither the charter nor the statutes in force in this State conferred upon the bank authority to deal in negotiable instruments of the types described, called in banking circles "acceptances."

The charter of the defendant contains the following provision: "The said corporation shall have the right to do a general banking business, to receive deposits, to make loans and discounts, to obtain and procure loans for any person, company, partnership, or corporation, to invest its own money or the money of others, to lend and invest money in or upon the security of mortgage, pledge, deed, or otherwise, on any lands, hereditaments or personal property, or interest therein of any description, situate anywhere; to lend money upon, or purchase, or otherwise accept, bills of lading or the contents thereof, bills, notes, choses in action, or any and all negotiable or commercial papers, or any crops of produce whatever, and what is known as cash credits, or any stock, bullion, merchandise, or other personal property, and the same to sell or in anywise dispose of, and to charge any rate of interest on such loans not exceeding the rate allowed by law."

Judgment was rendered in favor of the plaintiff, and the defendant excepted and appealed.

C. H. Gover for plaintiff.
Whitlock & McLain for defendant.

ALLEN, J. There are three grounds on which the plaintiff is entitled to recover:

1. The papers on which the action is brought come directly within the definition of an inland bill of exchange (Revisal, secs. 2276 and 2279), but which could be treated as a bill or note at the option of the holder, the drawer and drawee being the same person (Revisal, sec. 2280), and the charter of the defendant expressly authorizes it to accept "bills, notes, choses in action, or any and all negotiable or commercial papers."

2. The transaction is one not foreign to the purposes of the charter of the defendant, if not strictly within the powers conferred, and the plaintiff is a purchaser for value without notice.

"If the execution or endorsement of a negotiable instrument by a corporation is obviously foreign to the purposes of its charter, such an instrument is void into whosoever's hands it may come, for every person is chargeable with notice of its *ultra vires* character; but if a corporation is of such character that it may have occasion to execute or to take and endorse such instruments in the conduct of its business, and it accepts a bill or executes a note, or endorses a bill or note, for a purpose that is foreign to its objects, as where it gives its paper as an accommodation or in payment for property which it has no authority to purchase, the instrument will be binding in the hands of a purchaser for value and without notice." Clark Corp., 176.

3. The defendant having received the money of the plaintiff by the acceptances, and now holding it as its own, without offer to return it, and there being nothing in the transaction that is illegal or against public policy, the defendant cannot avail itself of the defense of *ultra vires.*

"Public policy requires that corporations should be confined strictly within the limits of their charters, and should not be allowed to exercise powers beyond those expressly conferred that would be hurtful to the public interest. But where corporations have exercised powers incidental to those conferred and in furtherance of the general objects of the corporation, although the subject of the contract may not be within any express right conferred, they will be estopped from denying that they had authority to make such contracts. Good faith to third parties who deal with such corporations and who may have no accurate knowledge of the extent of their powers under their charters requires the adoption of this salutary rule. This rule has its foundation in the plainest principles of natural justice. When such corporations have received the benefit of a contract, if there is nothing in it that is contrary to public policy, there can be no just reason why they should not be required to perform it." *Chicago Bld. Soc. v. Crowell,* 65 Ill., 459.

"But again, if it be conceded that the defendant had no power to enter into the contract of sale in this case and bind the company to perform the obligations assumed, viewed as a mere question of corporate power, yet having undertaken to do so, and having received the full consideraion agreed to be paid by the plaintiff, and he having fulfilled his entire contract they cannot now be permitted to set up that excess of authority to excuse them from that part of the contract which imposes an obligation upon them." *DeGraff v. Am. Linen Co.,* 21 N. Y., 127.

"If a corporation has received money or property or the benefit of services under an *ultra vires* contract, the courts are virtually agreed that it may be compelled to refund the value of that which it has actually received in an action *quasi ex contractu* in a proper case or in a suit for an accounting." Clark Corp., 177. See *Bank v. L. Co.,* 123 N. C., 26; *Trustees v. Realty Co.,* 134 N. C., 48.

In *Hutchins v. Bank,* 128 N. C., 73, approved in *Victor v. Mills,* 148 N. C., 111, the Court quotes the same doctrine as announced by the highest authorities, as follows: "In *R. R. v. McCarthy,* 96 U. S., 267, it is said: 'The doctrine of *ultra vires,* when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong,' citing several cases. And in *Board of Agriculture v. R. R.,* 47 Ind., 407, 'Although there may be a defect of power in the corporation to make a contract, yet if a contract made by it is not in violation of its charter or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise and in execution of the contract to expend money and perform his part thereof, the corporation is liable on the contract.' In *R. R. v. Trans. Co.,* 83 Pa. St., 160, 'Where a corporation has entered into a contract which has been fully executed on the other part, and nothing remains for it to do but to pay the consideration promised, it will not be allowed to set up the plea of *ultra vires.*' To same purport, 5 Thomp. Corp., sec. 6024, and cases cited."

We are, therefore, of opinion the judgment must be

Affirmed.

CORA AND JULIUS PRIDE v. PIEDMONT AND NORTHERN RAILWAY COMPANY.

(Filed 27 November, 1918.)

Carriers of Passengers — Electric Railroads — Negligence — Strangers — Reasonable Anticipation—Instructions—Trials—Appeal and Error.

A common carrier is not responsible in damages for injuries resulting from the unauthorized acts of strangers or other passengers on its cars which it could not reasonably foresee or anticipate, in the exercise of ordinary care, under the circumstances; and where a passenger on an interurban electric railway sues to recover damages for an injury received, when he was alighting at his station, from the sudden and unexpected forward movement of the car, after it had come to a stop, and the evidence is conflicting as to whether it was caused by an employee ringing the starting signal or a drunken passenger on the car doing so, whose condition, from his appearance and demeanor, was not reasonably observable, or whose act could not reasonably have been anticipated, the refusal by

the judge to specially instruct the jury upon this phase of the defense, upon a proper prayer duly tendered, constitutes reversible error.

APPEAL by defendant from *Long, J.*, at the Second April Term, 1918, of MECKLENBURG.

This is an action to recover damages for personal injury caused, as is alleged, by the negligence of the defendant.

Defendant owns and operates a line of interurban electric railway between Charlotte and Gastonia, via Rhynes Station, a regular stop. Plaintiff, Cora Pride, purchased a ticket from Charlotte to Rhynes Station and became a passenger upon defendant's train of two cars for that point, leaving Charlotte about 10:30 p. m., 23 December, 1916, and duly notified the conductor that she desired to alight at Rhynes Station. Plaintiff, Cora Pride, was accompanied by her husband, and when the train came to stop at Rhynes Station they both proceeded to get off. Just after plaintiff's husband had alighted and as plaintiff herself was in the act of alighting the train suddenly and without warning started forward, throwing her violently to the ground, whereby she was injured severely, so that she was confined to bed for some time.

Plaintiff testified that the colored porter, Bob Gayden, pulled the bell cord which caused the train to start prematurely, when he knew, or by using his faculties could have known, that she was in the act of descending the car steps. Defendant's witnesses testified that this negro porter had the right to pull the bell cord, that it was part of his duties.

Defendant's witnesses testified that the negro porter did not pull the bell cord and start the train, but that a passenger on the train, whose name is unknown, pulled the cord and started the train. The only witness who testified that Gayden, the porter, pulled the cord and started the cars was the plaintiff. Gayden, the porter, testified that he did not pull the cord and was on the ground when the car started, and he was corroborated in this by the conductor, Taylor.

J. M. Kendrick, a witness for the defendant, testified as follows, to wit: "I am the deputy sheriff of Gaston County, and was a passenger on the train the night Cora Pride fell out here at Rhyne. I do not recall the name of the man that started the car, but it was a white man standing right there close to me. He was a passenger in the car, and got off at Mount Holly. He was on the train from here out there. He was drinking. I saw Bob Gayden on the ground. He was on the ground when the car started. The man who started the car was under the influence of liquor. If they had been in the car they could have seen it. The conductor went through taking up tickets. I got after the man about drinking. I was standing up in there. The man was not cutting up any. No, he had not been giving any trouble before

that. When the conductor was passing through the car he was behaving all right. He had not been disorderly in Mr. Taylor's presence."

The defendant requested his Honor to charge the jury as follows: (1) If you find from the evidence the facts to be that the defendant's train was started by a stranger, without authority from it, you will answer the first issue "No."

His Honor refused to give this instruction, and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Clarkson, Taliaferro & Clarkson for plaintiff.
Osborne, Cocke & Robinson for defendant.

ALLEN, J. Common carriers are held to the highest degree of care for the protection of passengers, and are liable in damages not only for the wrongful acts of their own agents, but for those of strangers if they could be reasonably anticipated. The principle is fully recognized in this State in *Perry v. R. R.*, 153 N. C., 296; *Stanley v. R. R.*, 160 N. C., 323; *Mills v. R. R.*, 172 N. C., 266, and is correctly stated in brief of counsel for the plaintiff with citation of authority.

"While a common carrier is not an insurer of its passenger's safety, and is perhaps not bound to protect its passengers from injuries by third persons to the same extent and degree as from like injuries by its own agents or employees, yet it is the duty of its employees to exercise great care and vigilance in preserving order and in guarding passengers from annoyance, violence or insult threatened by fellow-passengers. . . ." 10 C. J., 900.

"The carrier must exercise the highest diligence reasonably practicable to protect passengers from assault, abuse or injury at the hands of fellow-passengers or third persons, and the carrier is responsible to a passenger for a wrong inflicted by an intruder, stranger, or fellow-passenger, if the conductor or other servant knew or ought to have known, or ought to have reasonably anticipated, that it was threatened or was reasonably to be apprehended, and it could, with the assistance of employees or other willing passengers, have prevented it, but failed to do so." 2 Moore on Carriers (2d Ed.), 1186.

"The negligence for which the railway is held liable is not the wrong of the fellow-passenger or the stranger, but is the negligent omission of the carrier's servants to prevent the wrong from being committed. In order that such omission may constitute negligence, there is involved the essential element that the carrier or his servants had knowledge, or with the proper care could have had knowledge, that the wrong was

imminent, and that he had such knowledge or the opportunity to acquire it sufficiently long in advance of the infliction of the wrong upon the passenger to have prevented it with the force at his command." Hutchison on Carriers, sec. 980.

The converse of this proposition is equally true that the carrier is not responsible for injuries resulting from the unauthorized acts of strangers which could not be reasonably foreseen or anticipated by the exercise of ordinary care, and it was this phase of the case the defendant asked to have submitted to the jury in the instruction, which his Honor refused to give. See *Fanshaw v. Norfolk Traction Co.,* 108 Va., 300; *McDonough v. Third Ave. R. Co.,* 88 N. Y. Supp., 609; *Andrews v. Northern Pac. R. Co.,* 88 Wash., 139; *Cary v. Los Angeles R. Co.,* 157 Cal., 599; *Krone v. Southwestern, etc., R. Co.,* 97 Mo., 609; *Cohen v. Pa., etc., Transit Co.,* 228 Pa., 243; *Moore v. Woonsocket, etc., Co.,* 27 R. I., 450.

The principle was applied in *Mills v. R. R., supra,* in which a nonsuit was sustained in an action to recover damages for an assault by a fellow-passenger, who was intoxicated, upon the ground that "there was nothing in the condition or conduct of George Wooten when in the presence of the conductor, or when he could have reasonably noted it, to give indication that he was quarrelsome or unruly," and the evidence in this case falls directly within the rule stated.

The plaintiff and the other passengers had traveled from Charlotte to Rhyne, a distance of about seven miles, and requiring from twenty to thirty minutes; the conductor had been through the car, but Kendrick, apparently disinterested, and the only witness who testified to the conduct of the stranger, said "the conductor did not see him drinking." "The man was not cutting up any." "He had not given any trouble before that. When the conductor was passing through the car he was behaving all right. He had not been disorderly in Mr. Taylor's presence," and there is no evidence to the contrary.

The record as it now appears presents a sharp conflict between the plaintiff and defendant, dependent on whether the car was started by the porter or by a stranger, and the defendant was therefore entitled to the instruction prayed for.

New trial.

STATE EX REL MATTIE L. A. OLIVER ET AL. v. THE UNITED STATES FIDELITY AND GUARANTY COMPANY AND E. E. GORHAM, ADMINISTRATOR, ETC.

(Filed 27 November, 1918.)

1. **Principal and Agent—Scope of Authority—Evidence—Duplicate Writing.**

A duplicate of an original written authority to an agent to act in respect of the matters in controversy, though unsigned by the principal, is competent as evidence of the authority therein conferred where it appears that the principal had prepared the original and duplicate, signed and retained the former and returned the duplicate to his agent, for in thus acting the principal becomes a party to the transaction to the same extent as if he had signed the duplicate.

2. **Same—Contracts—Agreements—Statute of Limitations—Principal and Surety—Litigation—Interests.**

A general agent, without respect to the usual scope of such agencies, may bind his principal by an act he was specially authorized to do; and where a general agent of a surety company has induced a ward to forego suing his principal, a surety on a guardian bond, until certain litigation had terminated, bearing directly upon the extent of his principal's liability, under promise not to plead the statute of limitations, and there is evidence that the agent was authorized by his principal to act in that litigation for it, both as agent and attorney at law, it is sufficient to be submitted to the jury, upon the question whether the agent's agreement not to plead the statute of limitations was within the direct authority given him by his principal, the surety company.

3. **Contracts—Statute of Limitations—Statutes—Writing—Parol Agreements—Equity.**

A promise not to plead the statute of limitations, when founded upon a sufficient consideration, is not required by our statute to be in writing, Revisal, sec. 371, and the parol promise is upheld upon the equitable principle that to permit the debtor to avail himself of its benefits before the statute had run and then deny his obligation would be against good conscience and tend to encourage fraud.

APPEAL by defendant from *Connor, J.*, at the February Term, 1918, of CUMBERLAND.

This is an action to recover the amount due the plaintiff as the ward of John C. Gorham against the defendant, the surety on the guardian bond.

The facts necessary to an understanding of the questions presented are stated in the report of a former appeal (174 N. C., 417), except that at the second trial the plaintiffs, in reply to the plea of the statute of limitations, contended that they were induced to delay the commencement of this action by the request of the general agent of the defendant not to sue and by the promise not to plead the statute of limitations.

There was evidence tending to prove this contention of the plaintiffs, but not that any request or promise was in writing.

At the conclusion of the evidence the defendant moved to nonsuit the plaintiffs upon the ground that there was no writing tending to prove the request or promise, and upon the admitted facts the plaintiffs' cause of action was barred. Motion was denied, and the defendant excepted. There are other exceptions, which will be referred to in the opinion.

There was a verdict and judgment for the plaintiffs, and the defendant appealed.

Sinclair & Dye for plaintiffs.
E. G. Davis and J. C. McRae for defendant.

ALLEN, J. When this action was tried the first time in the Superior Court it was held that the defendant was not protected by lapse of time under the plea of the statute of limitations because it was a foreign corporation and had not appointed a process agent in the State, following *Voliver v. Cedar Works,* 152 N. C., 656, but this ruling was reversed on appeal and a new trial ordered upon the ground that, while no regular process agent had been appointed, the defendant had at all times after the cause of action accrued a general agent in the county of Cumberland upon whom the summons might have been served, and but for this fact the judgment in favor of the plaintiffs would have been affirmed. See *Anderson v. Fidelity Co.,* 174 N. C., 417.

At the second trial the plaintiffs replied to the plea of the statute of limitations that the commencement of the action had been delayed at the request of the same general agent, and because they were led to believe by his conduct and promises that the amount due would be paid as soon as the claim of Mrs. Chedister was settled, and that the lapse of time would not be relied on, and the defendant met this position of the plaintiffs by the contention that the agent was one of limited powers, that he was not a general agent and could not bind the defendant except in the execution of certain bonds, and that defendant was not therefore bound by his request not to sue, or by the promise not to plead the statute of limitations, and further that no request or promise of the agent could avail the plaintiffs because not in writing.

The important questions, therefore, presented by this appeal are exceptions to evidence tending to show the authority of the agent, the extent of the powers of the agent, and whether the request not to sue and the promise not to plead the statute of limitations must be in writing, and these will be considered in their order.

The plaintiff offered in evidence a paper-writing in which the agent agreed with the defendant, among other things, "To assist in the inves-

tigation and settlement of claims made upon bonds, policies, or the company's other insurance."

This paper was objected to because it was not signed by the defendant, but it was properly admitted because it was in evidence that the paper was prepared by the defendant in duplicate and sent to the agent for his signature; that he signed both copies and returned them to the defendant, and that the defendant then sent one copy to the agent, retaining the other.

When the defendant prepared the paper and required the agent to agree with the defendant to do certain things, and retained it in order that it might enforce its terms, it became a party to the agreement, as much so as if its signature had been attached.

While this agreement was in force the widow of the guardian, John C. Gorham, then Mrs. Chedister, filed a claim against the estate of the guardian, seeking to have a debt due her of about $6,000 declared a charge on the residence lot.

The defendant was interested in this litigation because if the claimant succeeded, the assets from the estate of the guardian applicable to the claim of the plaintiffs in this action would be reduced and the liability of the defendant herein correspondingly increased. The agent notified the defendant of the pendency of the litigation, and it employed an attorney to represent it with the agent, who was also an attorney, which they did, although the defendant was not then a party to the record.

The claim of Mrs. Chedister was not finally settled until 1916, less than a year before this action was commenced, and then in favor of the defendant's contention (see *In re Gorham*, 173 N. C., 272), and while pending the plaintiffs made frequent demands upon the agent for payment of the amount due them, and were met by the request to wait until the Chedister litigation ended in order that the amount to be applied from the guardian's estate could be ascertained, and by the assurance that defendant would pay without regard to the lapse of time. The agent then had in charge for the defendant, as agent and attorney, the interest of the defendant in the Chedister claim, which was closely related to the demand of the plaintiffs, at the time the requests and promises were made, and these were to promote the interest of the defendant and inured to its benefit.

Under these conditions, considered in connection with the evidence of the agent that he was general agent and the requirement in the agreement to assist in the settlement of claims, we are of opinion there is ample evidence of authority in the agent to bind the defendant by the promise not to plead the statute of limitations, as the principal is responsible for the acts of the agent when specially authorized, and also "When the agent acts within the scope of his apparent authority, unless

the third person has notice that the agent is exceeding his authority, the term 'apparent authority' including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact business or to execute the commission which has been intrusted to him." *Bank v. Hay,* 143 N. C., 331.

The remaining question is whether it is necessary for the request and promise to be in writing, the defendant relying on Revisal, sec. 371, which is as follows: "No acknowledgment or promise shall be received as evidence of a new or continuing contract, from which the statutes of limitations shall run, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

It is true that *Smith, C. J.,* for whose learning we have the highest respect, said in a concurring opinion in *Joyner v. Massey,* 97 N. C., 153, that this statute applied to promises not to plead the statute of limitations, and this is referred to without approval or disapproval by *Clark, C. J.,* in *Brown v. R. R.,* 147 N. C., 217, but the opinion of the majority of the Court in *Joyner v. Massey* was the other way, and it is expressly decided in *Cecil v. Henderson,* 121 N. C., 244, that the statute has no application, and that requests not to sue and promises not to plead the statute of limitations need not be in writing.

In giving effect to such requests and promises, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and to encourage fraud to permit the debtor to repudiate them when by his conduct he has lulled the creditor into a feeling of security and has induced him to delay bringing action (*Daniel v. Comrs.,* 74 N. C., 494; *Haymore v. Comrs.,* 85 N. C., 268), and it is now "settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea." *Tomlinson v. Bennett,* 145 N. C., 281.

"A debtor has frequently been held to be estopped from relying on the statute as a defense where by acts of a fraudulent character he has misled the creditor and induced him to refrain from bringing suit within the statutory period. And if a defendant intentionally or negligently misleads a plaintiff by his misrepresentations and causes him to delay suing until the statutory bar has fallen, the defendant will be estopped from pleading the statute of limitations. And the prevailing view seems to be that the doctrine of estoppel applies where the creditor, before the debt is barred, is lulled into security by the oral promise of the debtor that he will not avail himself of the statute of limitations,

and suit is delayed by reason thereof. It is not necessary that the debtor should intend to mislead, but if his declarations are such as are calculated to mislead the creditor, who acts upon them in good faith, an estoppel will be created." 17 R. C. L., 884.

In the note to *Missouri R. R. v. Pratt,* 9 Ann. Cases, 755, a large number of cases are cited in support of the statement that "It is a well-settled general rule that a defendant who has not expressly waived the defense of the statute of limitations may be estopped by his conduct from setting up the statute where his conduct, though not fraudulent, has nevertheless directly induced the plaintiff to delay bringing suit until after the expiration of the statutory period." And in *Schrolder v. Young,* 161 U. S., 334, the Court says, "Defendant relies mainly upon the fact that the statutory period of redemption was allowed to expire before this bill was filed, but the court below found in this connection that before the time had expired to redeem the property the plaintiff was told by the defendant Stephens that he would not be pushed, that the statutory time to redeem would not be insisted upon, and that the plaintiff believed and relied upon such assurance. Under such circumstances the courts have held with great unanimity that the purchaser is estopped to insist upon the statutory period, notwithstanding the assurances were not in writing, and were made without consideration, upon the ground that the debtor was lulled into a false security."

There was, therefore, no error in denying the motion to nonsuit on the ground that the promise was not in writing.

We have examined the other exceptions, many of them taken to preserve the rights herein considered, and find nothing that would warrant a reversal of judgment.

No error.

COUNTY OF CALDWELL AND E. L. STEELE, TREASURER, v. JOHN J. GEORGE.

(Filed 4 December, 1918.)

1. Appeal and Error—Findings—Consent—Evidence.

Where, by agreement, a jury trial has been waived by the parties to an action and, by consent, the judge has found the facts upon the evidence, his findings are not reviewable upon appeal when supported by the evidence.

2. Bonds—Municipal Corporations—Bills and Notes—Presentment for Payment—Delays—Payee's Request.

Where nonresident bidders for an issue of county bonds, through their authorized agent, has put up their checks required as a condition precedent, as evidence of good faith, and later request a special act of the Legis-

lature to be passed to give the bonds validity, and also a decision of the Supreme Court decision thereon, evidence that they acted throughout with the county commissioners to produce the result they requested is sufficient evidence that they had not withdrawn their bid, and their checks given for the faithful performance of their obligations, presented for payment within a reasonable time thereafter, are subject, in an action brought by the county, to the damages sustained by reason of a resale of the bonds, made necessary by their conduct.

3. Same—Principal and Agent.

Where the authorized agent of nonresident bidders for an issue of county bonds has endorsed the notes of his principal required as a condition precedent, and given his own note, with his principal's endorsement, as a pledge of their good faith in making the bid, and has actively participated in and requested the delays necessary to satisfy his principal as to validity of the bonds, his endorsement and note carries with them a personal liability, and his conduct is evidence that his liability has not ceased or the bid withdrawn, and the county may maintain a personal action to recover on the notes given, to the extent of its loss occasioned by its being forced to make a resale of the bonds.

4. Contracts—Writing—Ambiguity—Evidence—Conditions—Parol Evidence.

The surrounding circumstances of the parties, when relevant, and parol evidence thereof, is competent to show the agreement of the parties to the written contract, which the law does not require to be in writing, when it is expressed in ambiguous language or susceptible of more than one interpretation; and this principle applies to a contract made with an agent relative to his having also assumed a personal liability thereunder.

5. Appeal and Error—Evidence—Competent in Part—Objections and Exceptions.

Exceptions to evidence which is competent in part will not be sustained on appeal.

6. Principal and Agent—Bills and Notes—Delay in Presentment—Agent's Liability.

Where an agent has incurred a personal liability on negotiable instruments given in behalf of his principal, he may not avoid payment on the ground of delay in presenting them for payment when it was caused at his own request and by his own conduct.

7. Same—Evidence—Correspondence.

Where an agent seeks to avoid liability on notes he has given in his principal's behalf, whereon he is personally liable, on the ground of delay in presenting them, and there is evidence that this delay was occasioned by his own request and conduct, his correspondence with the payee bearing directly upon the question is competent against him in an action to recover upon the notes.

APPEAL by defendant from *Cline, J.*, at the May Term, 1918, of CALDWELL.

This is an action to recover judgment against the defendant George as endorser of certain checks of Sidney Spitzer & Co. aggregating $1,900 and as drawer of one check for $1,100.

A jury trial was waived and the court found the facts and announced certain conclusions of law as follows:

1. In the fall of 1916 the commissioners of Caldwell County deemed it necessary to issue and sell $50,000 of county bonds, the proceeds to be used: $38,000 thereof for rebuilding roads and bridges destroyed in the July flood and $12,000 for purchasing a new site for a county home. They advertised for bids for such bonds to be opened on 6th December, and Sidney Spitzer & Co., of Toledo, Ohio, through the defendant, John J. George, as their agent, filed a bid for the same at par, with accrued interest to delivery, and a premium, the rate of interest and time of maturities being fully understood and agreed upon. The commissioners had specified that each bid should be accompanied by a certified check for $3,000, payable to them or the county, to support and protect the bid and as security for its performance. Mr. George deposited five checks dated 24 November, 1916, aggregating $1,900, drawn by Sidney Spitzer & Co., payable to "John J. George, agent," endorsing each of them "John J. George, agent," and his own check for $1,100 on the First National Bank of Cherryville, N. C., payable to the order of W. J. Harrington, chairman.

2. Spitzer & Co. referred the matter to Hon. John C. Thompson, corporation lawyer of New York, who expressed doubt as to the validity of both the road and bridge bonds and the county home bonds. On 9th January, 1917, the plaintiffs and their attorneys procured the passage by the General Assembly of an act to authorize Caldwell County to issue bonds to improve and maintain the public roads and refund the debt incurred for building roads and bridges and to secure a site for and build a new county home.

3. This still did not remove the doubt from the mind of Mr. Thompson, counsel to Spitzer & Co., and he was yet unwilling to certify the bonds to be valid and binding upon the county. It resulted that a case was constituted for the Supreme Court, *Comrs. v. Spitzer*, 173 N. C., 147, opinion filed 14 March, 1917, in which the validity of the county home bonds was upheld and the doubt about the road and bridge bonds raised by the decision of the *Campbell* (Ohio) *case* disposed of by our own decisions in *Reade v. Durham, Rankin v. Gaston County,* and *Richardson v. Comrs. of Caldwell*, opinions handed down 30 May, 1917. The latter case was made up at the suggestion of Spitzer & Co., as shown by their letter of 15 March, 1917, they also having suggested a court decision touching the county home bonds in their letter of 5th February. They were ready and willing to take the bonds, as their correspondence shows, up to May, 1917 (and in March had the form of the $38,000 road bonds printed and sent to commissioners), provided always Mr. Thompson approved and accepted them. On 24th May they

notified the attorneys of the plaintiffs that they held themselves no longer obligated to take the bonds and asked a return of their certified checks. The reason given was on account of the unreasonable delay in the delivery of these bonds.

4. The defendant John J. George was the agent for the bidder for the bonds, a relationship well known to all concerned. The checks or drafts by him were not on and certified by any bank, but were certified by the drawer, Spitzer & Co., to be good when properly endorsed. When he tendered them to the board of commissioners he added his own check for $1,100 to make up the required deposit of $3,000, and stated to the board that he was solvent and had property in North Carolina sufficient to make his endorsement good, as well as his own check good. The board accepted these papers and contracted to sell the bonds to his principal, Spitzer & Co. He requested the board not to send them in for collection, saying he would replace them with New York Exchange. On 1 June, 1917, he wired plaintiff's attorney, "Suggest you not press payment of my check. When you get Supreme Court decision we may be able to adjust matters."

5. The defendant was acquainted with the status of the transaction when he wrote the letter of 5 January, 1917, and was inquiring about its progress on 26th March and seeking to aid in its confirmation on 6th April, 9th and 31st June, and as late as 3d August, several months after the bonds had been declined by his principal. He had not then and did not demand a return of his check.

6. Spitzer & Co. did not elect to withdraw their bid, nor did the defendant, their representative and agent, elect to do so, because the bonds for roads and bridges ($38,000) could not legally be issued in December, 1916, except upon approval by popular vote or without the assistance of the act of Assembly, ratified 8 January, 1917, being chapter 67, Public-Local Laws of 1917, but continued the bid in force, giving opportunity to the plaintiffs to have themselves clothed with authority and to resolve any further doubts by Supreme Court decision. While on several occasions in the spring of 1917 making some complaint of the delay and trouble incident to their issue, both Spitzer & Co. and the defendant reiterated their willingness to accept them if legal, this until 24th May, as before stated, Spitzer & Co. were on 11 January, 1917, notified of the legislative enactment of 9th January, above mentioned, repealing chapter 468, Public-Local Laws of 1913, and on 15th January they authorized Mr. Thompson to prepare a resolution to be adopted by the commissioners of Caldwell in compliance with this special act of the Legislature.

7. On 2 February, 1917, Mr. Thompson, attorney for Spitzer & Co., rendered an opinion declining to approve of the county home bonds, but

approving the road and bridge bonds. On 11th February Spitzer & Co. proposed to take the road bonds at a premium of $361 and the county home bonds at a premium of $174, and the county board assented to this. The Spitzer & Co. checks were presented to them for payment on 25 June, 1917, and payment was refused, the reason given the notary being "contract not complete." They were then protested. The George check was on 4th June presented to the Cherryville bank, on which it was drawn, and payment refused as having been stopped by him. It was then protested. The delay in presentation in each case was at the special instance and request of the defendant.

8. Later the plaintiff board ordered the bonds to be resold and directed that action be taken for the recovery of any deficiency or lossage below the bid of Spitzer & Co. They were finally sold to Cummings, Prudden & Co. at par, accrued interest, and a premium of $137, but at a rate of 5½ per cent interest, no bids having been received for 4¾ or 5 per cent bonds. The shortage in the proceeds of such sale below the bid of Spitzer & Co. was more than $3,000. The checks aggregating $1,900 were on 24 November, 1916, (prior to their delivery to the plaintiffs) certified by Spitzer & Co. to be good when properly endorsed. The plaintiffs are the owners and holders of said checks as well as the aforesaid individual check of the defendant George. They brought this suit against him alone.

9. The court finds that Mr. George meant to say to the commissioners that he personally assured and guaranteed them that his principals would keep and perform their proposed contract, and he was depositing evidences of debt to the amount of $3,000, to the payment of which in due course he was personally obligating himself in order that the board might not reject the bid on account of any failure to make the deposit required as a condition precedent. It concludes and holds as a matter of law that he thereby bound himself to the extent of this $3,000 for the performance of the contract upon the part of his principals.

10. The court is of the opinion that the county commissioners could not legally issue the $38,000 of road and bridge bonds prior to the enabling and validating act of Assembly of 9 January, 1917, and that, therefore, Spitzer & Co., or the defendant, could have at any time recalled their bid and have withdrawn it, though the $12,000 of county home bonds were at all times regular and valid. They did not do this, but assented to the act of validation and kept their bid intact. So the court holds that the contract was not void or avoided on that account.

11. As to the resolutions adopted by the board of county commissioners of February, 1917, superseding, rescinding and annulling all other resolutions (now found as a fact to have been prepared by Mr. Thompson, representing Spitzer & Co., and adopted at his and their

suggestion and request), the court holds as a matter of law they did not have the effect of canceling and annulling the contract for the purchase of the bonds, but was all a part of the method or course deemed by Mr. Thompson necessary to be pursued to carry out the contract legally and effectually, and this was concurred in by all parties, including the defendant.

12. As to the so-called new contract of 14 February, 1917, the court is also of opinion, and so holds, that it was not a new and separate contract to supersede the original to the extent it would release the $3,000 deposit, but was a part of the working out of the difficulties which in one way and another had operated to delay the consummation of the trade; that said deposit was still in force to secure the performance of this amended proposition, and that the defendant also continued to be bound thereon.

13. Upon the defense of unreasonable delay, this is to be determined in the light of all the facts and the conduct of both parties. Neither the defendant nor his principals stood upon this ground, but extended again and again to the plaintiffs the opportunity to clear up the objections of Mr. Thompson, so that delivery of the bonds could be made, and it is concluded and held in law that when the notice was given on 24th May there had not been such unreasonable delay as to release the purchasers from the obligations of their contract. The plaintiffs were able, ready, and willing to deliver the bonds to defendant for Spitzer & Co., or direct to the latter, for more than four months prior to 24th May, and they were legally bound and obligated to take them during that time and on the day of their notice of refusal.

14. From a consideration of the foregoing, it is clear that any loss, equitably speaking, ought to be borne by Sidney Spitzer & Co. But they are not before the court and there is no jurisdiction over them. John J. George is the only defendant, and the court concludes and adjudges that he is liable to the plaintiffs upon his endorsement and check for any loss sustained by them up to $3,000; and it having been found as a fact that they suffered a loss upon the resale of more than that amount, the plaintiffs are entitled to judgment against the defendant for $3,000 and cost of action.

The contentions of the defendant are:

1. That the drafts and checks were deposited as an evidence of good faith on the part of Sidney Spitzer & Co. in performance of an agreement of 6 December, 1916, and that this was an absolute nullity.

2. That the attempted contract of 6 December, 1916, was expressly rescinded and annulled by the plaintiff on 9 February, 1917, and later by the negotiations and agreement of 14th February and 5 March, 1917.

3. That the defendant was a disclosed agent, the scope of his agency

fully known; that in any view of the case, the drafts for $1,900 were the obligations of Sidney Spitzer & Co. alone, and that he, the known agent, incurred no personal liability.

4. That if it were conceded that the defendant was ever liable, he was never more than a surety for another under the contract of 6 December, 1916, and that by reason of the rescission and modification of 9th February and 5th March he is discharged.

5. That if it were conceded that the defendant was ever liable, he (the defendant) is discharged because of the failure of the plaintiff to present the instruments in a reasonable time. This is especially urged in the case of the drafts.

6. That there was no proper evidence of damage.

The defendant also took several exceptions to the evidence, which will be referred to in the opinion.

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

W. C. Newland and Mark Squires for plaintiff.

Mason & Mason, Lawrence Wakefield, and George W. Wilson for defendant.

ALLEN, J. A jury trial being waived, the findings of fact by the judge have the force and effect of a verdict, and are conclusive upon us, in the absence of an exception that there is no evidence to support them (*Matthews v. Foy,* 143 N. C., 384), and there is no such exception in the record. We have set out these findings at length because they meet and answer every position taken by the defendant and fully sustain the judgment in favor of the plaintiff.

It is true the checks were deposited to guarantee the performance of the contract of 6 December, 1916, and that the plaintiff was without authority at that time to issue the bonds, but his Honor finds that neither Spitzer & Co. nor the defendant elected to withdraw the bid for the bonds or demand the return of the checks because the bonds could not be legally issued, but that, on the contrary, they "continued the bid in force, giving opportunity to the plaintiff to have themselves clothed with authority and to resolve any further doubts by Supreme Court decision." And the same finding applies with equal force to the second contention, the resolution of 9 February, 1917, and the negotiations and agreement of 14th February and 5 March, 1917, being with the knowledge and approval of Spitzer & Co. and the defendant, the court finding further that "while on several occasions in the spring of 1917 making some complaint of the delay and trouble incident to this issue, both Spitzer & Co. and the defendant reiterated their willingness to accept

them if legal, this until 24th May," at which time the plaintiff was ready and able to issue the bonds.

The personal liability of the defendant George is put beyond controversy because it is found that at the time the drafts and check were deposited by him he "meant to say to the commissioners that he personally assured and guaranteed them that his principals would keep and perform their proposed contract, and that he was depositing evidences of debt to the amount of $3,000, to the payment of which in due course he was personally obligating himself in order that the board might not reject the bid on account of failure to make the deposit required as a condition precedent" (finding 9).

This finding is based on the evidence of Mr. Squires, who testified: "I know the handwriting of W. J. Harrington, chairman of the Board of Commissioners of Caldwell County. I saw him endorse the check of John J. George, No. 8321, dated 6 December, 1916. I heard Mr. George, the defendant, say that he signed this check, and that Mr. Harrington endorsed it. I had a further conversation with Mr. George in reference to that check. At the time of the original negotiations I was not in Lenoir, but I met Mr. George in Raleigh very early in the month of January, 1917. I had a talk with him and a Mr. Emory; he was introduced as being a representative of Sidney Spitzer & Co., Toledo, Ohio. He said the checks were drawn by Sidney Spitzer & Co. in his favor as agent; that he did not have certified checks drawn by a bank, but he made the checks over to the Caldwell commissioners and made a statement to the board that he was solvent and had property in North Carolina sufficient to make his endorsement good, as well as his own check good, and he requested that these checks be not sent in for payment. Furthermore, he stated that he told the board not to send the checks in, that he would replace them with New York Exchange."

To the foregoing evidence, and all of it, the defendant objected and excepted in apt time.

The exception could not be sustained in any event because it is directed to all of the evidence of the witness, some of which is competent beyond question (*Phillips v. Land Co.*, 174 N. C., 545), but we are also of opinion the part tending to show personal liability of the defendant, to which the argument has been chiefly directed, is not objectionable because the personal liability of the defendant as agent was dependent on surrounding circumstances and conditions, and "Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time

of making the contract and to determine the object on which it was designed to operate." 10 R. C. L., 1065.

"So where it is uncertain on the face of an instrument whether it was intended to bind the principal or the agent, parol evidence is admissible to explain the latent ambiguity, and to aid in the interpretation." 10 R. C. L., 1067.

The delay in the presentation of the drafts and check "in each case was at the special instance and request of the defendant" (finding 7), and he cannot now complain that the plaintiff did not demand payment earlier; nor does any change in or modification of the original contract have the effect of relieving the defendant from liability because the action of the plaintiff was with his knowledge and approval and at his instance. Even after Spitzer & Co. attempted to withdraw their bid on 24 May, 1917, the defendant, instead of asking that the drafts and check be returned, continued his negotiations with the plaintiff and recognized the contract to be in force. On 1st June he telegraphed counsel for plaintiff, "Suggest you not press payment my check. When you get Supreme Court decisions we may be able to adjust matters," and he wrote on 4th June, "Arrange meeting your county board for next Monday. Want to get everything adjusted satisfactorily." During all this time the plaintiff was endeavoring to meet every objection and held itself ready to deliver bonds, whose legality could not be questioned.

The evidence of damage is that, upon refusal of Spitzer & Co. and the defendant to take the bonds according to their contract, the plaintiff, after exercising due diligence and proper precautions, was compelled to resell the bonds at a loss in excess of the amount of the drafts and check, which justified the finding as to damages. The correspondence between the parties, to which objection was made, was competent as explanatory of the delay and for the purpose of showing that the original bid, with its securities, was kept open and was continuing.

The conclusion and judgment of his Honor are in our opinion just, and are supported by the facts and the law applicable thereto.

Affirmed.

IN RE WILL OF J. N. LEDFORD.

(Filed 4 December, 1918.)

Wills—Letters—Holograph Wills.

A letter written by the deceased a few days prior to his death, giving a list of his property and effects and of his indebtedness, and made in favor of his wife, requesting the addressee to so invest his property that she

will "get it as she needs it," so that she will have a plenty as long as she lives, etc., is valid as a holograph will appointing the addressee as executor, etc., when meeting the requirements of the law that it being the testator's handwriting, his signature appearing therein, and sealed and found in the writer's safe among his valuable papers, etc., there being no particular form of a will necessary, and the writing in question evincing an *animo testandi*. *Spencer v. Spencer*, 163 N. C., 88, cited and distinguished.

APPEAL by caveator from *Long, J.*, at the September Term, 1918, of ROWAN.

This is a caveat to a paper-writing offered for probate as the will of J. N. Ledford upon the ground of mental incapacity on the part of the said Ledford, and that the paper-writing offered for probate is a letter and not a will.

The issue of mental incapacity was found in favor of the propounders, and there is no exception thereto.

The paper-writing offered for probate is as follows:

MR. J. B. IVEY, 3/9/18.
Charlotte, N. C.

DEAR SIR:—Please administer on my estate, and I want my wife (Ella Gnatt Ledford) to have everything I own, but invest it or fix it so she can get it as she needs it so she cannot lose it. Please look after Ella and the children and see that they have what is necessary and do not suffer.

Liberty Bond	$ 500.00
I have stock in Bank of Cooleemee which is worth about	3,000.00
I have stock in Cooleemee Telephone Company which is worth about	1,250.00
I have stock in J. N. Ledford Company which is worth about	9,000.00
I have life insurance, $6,000; notes, $11,000; certificates of deposits, $2,500	18,500.00
House and lot, $9,000; other items, $3,250	12,250.00
	$44,500.00

All I owe is a $500 note at Bank of Cooleemee.

I am on only one note as security, and it is for $400 for A. D. Walker.

My notes, insurance policies, stock certificates are in a tin box in the Bank of Cooleemee, and I have a personal drawer in the safe of J. N. Ledford Company, with papers in it.

Please do the very best you can for my wife and children.

Fix my property so my wife will have plenty as long as she lives, if there is enough. J. N. LEDFORD. (*Seal*)

The circumstances with regard to this paper-writing having been sealed and put in an envelope and deposited in the safe of the J. N. Ledford & Co. along with all of the valuable papers of J. N. Ledford, and that the entire paper, including the signature thereto, under seal, was in the handwriting of J. N. Ledford, and that the paper-writing was placed in such sealed envelope and deposited in his safe with his valuable papers and had on it the name of J. B. Ivey—all these facts were admitted.

The verdict of the jury having established the fact that J. N. Ledford on 9 March, 1918, when this paper-writing was executed, had sufficient mental capacity to make a will, it was agreed by counsel that the other question was a question of law, that is to say, whether or not the paper-writing on its face is a will.

The court held upon all the facts admitted and the findings of the jury and the inspection of the paper-writing itself, which was executed under seal, that the same is the will of J. N. Ledford, and to this ruling the caveators excepted and appealed to the Supreme Court from judgment rendered thereon.

W. S. Lockhart for caveator.
R. M. Gantt for propounder.

ALLEN, J. No particular form is required for the disposition of property by will, and "the distinguishing feature of all testamentary instruments, whatever their form, is that the paper-writing must appear to be written *animo testandi.*" *Spencer v. Spencer,* 163 N. C., 88.

Tested by this principle, we have no doubt as to the correctness of the ruling holding the paper-writing offered for probate to be in form a will. The paper was written by the maker two days before his death, and evidently in contemplation of death. It enumerates all of his property and contains a statement of his indebtedness; it gives everything to his wife, but wants it invested so the wife will "get it as she needs it," and fixed so she will have plenty as long as she lives, and asks Mr. Ivey, to whom it is addressed, to administer on his estate. The maker could not have given stronger evidence of a purpose to settle his estate and to dispose of it after his death. The fact that it was in the form of a letter detracts nothing from its testamentary character. Numerous cases will be found in the notes to *Richardson v. Hardee,* 15 L. R. A., 635, and *Milon v. Stanley,* 17 L. R. A. (N. S.), 1126, in support of the principle stated in the latter that "The rule that an instrument is valid as a will, if properly executed, whatever its form, provided the intention of the maker was to dispose of his estate after his death, is applicable to writings in the form of letters."

The case of *Spencer v. Spencer, supra,* is no authority for the position that a paper in form of a letter cannot be a will; it simply holds that the paper then offered for probate had none of the earmarks of a will.

Affirmed.

FRED E. HINSON, BY HIS NEXT FRIEND, MARY HINSON, v. BRADY HINSON, EXECUTOR OF MOSES HINSON.

(Filed 4 December, 1918.)

1. Wills—Interpretation.

Wills should be construed as a whole, without rejecting words having a reasonable significance in connection with their subject-matter, giving them their legal meaning when they have a clearly defined significance; and the construction of the will should be in recognition of the principle that the first taker, when not inconsistent with the other provisions of the will, is to be regarded as the primary object of the testator's bounty.

2. Same—"Estate"—Care of Testator's Wife—Period Designated—Compensation—"A Year"—Annually.

A devise of lands to the wife for life and to such of the testator's sons as will stay with and take care of her during her life, one hundred dollars a year to be paid out of the estate, it appearing that the personal property was without significance, and that the income from the land would support the wife, requires that the son, to get the benefits under the will, shall comply with its terms for the whole of the period stated, signifying that the "one hundred dollars a year" should become a charge both on the real and personal "estate" at the death of the wife, and that the use of the words "one hundred dollars a year" was not intended as synonymous with "annually," but prescribed a method of ascertaining the amount to be paid to the son, who had fully complied with the requirement designated.

BROWN, J., concurring; WALKER, J., concurring in opinion of BROWN, J.

APPEAL by defendant from *Harding, J.,* at the May Term, 1918, of UNION.

This is an action to recover $200, commenced before a justice of the peace and tried in the Superior Court on appeal on an agreed statement of facts.

The claim of the plaintiff is based on paragraph 5 of the will of Moses Hinson, which is as follows: "My will and desire is that whichever one of my sons that will stay with and take care of my wife during her life shall receive the sum of one hundred dollars a year, to be paid out of my estate."

The plaintiff, Fred E. Hinson, is one of the sons of said Moses Hinson, and remained in the home of the widow, Mary Hinson, after the

death of the testator for more than two years before the bringing of this action, and in compliance with the will of his father "took care of" the widow. Upon demand made on the executor for the sum of $200 the executor declined to pay the plaintiff anything for his services.

The testator died on 25 February, 1916, and this action commenced on 28 February, 1918. The widow is still living.

It is found as a fact, by agreement of parties, that at the commencement of this action the plaintiff was entitled to recover the sum of $200, if anything.

Judgment was rendered in favor of the plaintiff, and the defendant appealed.

Stack & Parker for plaintiff.

R. B. Redwine and John C. Sikes for defendant.

ALLEN, J. In construing wills, every part is to be considered, and no words ought to be rejected if any meaning can possibly be put upon them. The instrument is to be dealt with as one act. Apparently inconsistent provisions must be reconciled if it can reasonably be done. *Satterwaite v. Wilkinson,* 173 N. C., 40. When language is used having a clearly defined legal signification, it must be given its legal meaning and effect, and the first taker is regarded as the primary object of the testator's bounty. *Whitfield v. Douglas,* 175 N. C., 48.

Applying these principles, we find in the will before us the word "estate," which has been held to include land (*Powell v. Woodcock*, 149 N. C., 238); "to be paid out of my estate," which creates a charge on land (*Bray v. Lamb,* 17 N. C., 372), and "a year," which has been held not to be synonymous with "annually," and to be used as a means of fixing the rate of compensation. *Edwards v. R. R.,* 121 N. C., 491.

The will, then, in the light of these authorities, would read, "whichever one of my sons that will stay with and take care of my wife during her life shall be paid at the rate of $100 a year, and this shall be a charge on my personal and real property."

The testator gave the whole of his estate to his wife for life, expecting her to be supported out of the income; and in the fifth item he was making provision for the care and attention, which a son in the home could give without any considerable tax on his time, and the item does not include strangers, but is confined to sons, who would be moved by other considerations than the amount of money paid and to whom their father gave all his property after the death of their mother. Can it be possible under these conditions, with the support of his wife during her life the paramount and controlling idea in the mind of the testator, that he intended to create a charge on his estate in favor of a son who

stayed with her and took care of her for a less time than her life, which could be enforced prior to her death, and thereby make it possible for her to be deprived of her life estate and means of support? And this might be the result if the plaintiff can maintain this action, because if entitled to recover he can have the amount due declared a charge on the estate and would be entitled to an order of sale to discharge it. *Bray v. Lamb, supra.* This is not only possible, but probable, since it appears from the agreed statement of facts that the personal estate in the hands of the executor is only about $40, and it would therefore be necessary to sell the land to satisfy the plaintiff's claim.

The will, considered as a whole, forbids this construction, and when we turn to item 5 the language is plain and explicit that compensation shall be paid to the son who stays with and takes care of the wife "during her life," and to no one else.

If it be said that this may deprive the wife of the care and attention of a son, as he would not stay with his mother if he was to be paid nothing until her death, and thus defeat the intent of the testator, the answer is, first, we are not at liberty to depart from unambiguous language used by the testator to avoid a danger which may never arise, and, again, the provision is for a son, not a stranger, who would be moved by his affection for his mother and would not be calculating on the length of her life, and who would know that upon her death his brothers would have to account for the amount of his compensation in a division of the property. The case of *Nunnery v. Carter,* 58 N. C., 370, in which language, not as clear and imperative as in the will before us is construed, is an authority for the position that it was not the intention of the testator for the property to be sold during the life of the wife, and that the services were to continue during life.

The language in the Carter will was "To his said wife during her natural life, and then 'to be James Carter's, provided he take care of his mother; if not, to be whose that does take care of her,'" and the Court said, "Of the property given to his wife for life, the testator directs that a part should be sold and divided among the other children, leaving his son James the remaining part, upon the condition of his taking care of his mother. She was not to be taken care of out of the property, for that was already given to her for life, and nothing is stated, either in the will or the pleadings, to show that she needed anything more than the ordinary care and attention due from a son to his mother." And, again, "We have hitherto considered the condition as if it were a single act, to be done or omitted at once, like the case of a legacy to one, provided he should marry the testator's daughter, mentioned in the works to which we have referred. But in truth it is a continuing condition which might require the performance of many

acts during a long series of years. Had his widow survived the testator his son James was to be charged with the care of her during her whole life, whether long or short."

We are, therefore, of opinion the plaintiff cannot maintain his action for compensation until after the death of his mother.

Reversed.

BROWN, J., concurring: I concur in the opinion of the Court, and also am of opinion that the action should be dismissed upon the further ground that a justice of the peace has no jurisdiction to enforce the payment of a legacy devised by will or to enforce a charge created by will upon the *corpus* of the estate.

J. M. ELLIS, ADMR. OF SETH COX, DECEASED, v. CYRUS COX ET ALS.

(Filed 4 December, 1918.)

1. **Parent and Child — Contract — Services Rendered — Implied Promise to Pay—Son-in-Law.**

   Services rendered by a child to his parent while living as a member of the family, including the relationship of son-in-law, are presumed to be gratuitous, and no recovery can be had therefor, in the absence of an express contract, when nothing appears except the relationship and the performance of the services; but, under certain circumstances, the jury may find as a fact an intent on the one part to charge and on the other to pay for the services rendered, whereupon the law will imply a contract to pay for their reasonable value.

2. **Same—Reference—Findings—Evidence—Intent.**

   Where, upon the evidence, a referee has found as a fact that services rendered to a father by his daughter and her husband while living with him as members of his family were rendered and received in such manner and under such circumstances as created an implied contract to pay what they were reasonably worth: *Held*, the finding is sufficient and will be upheld; and the intent, though not appreciable to the senses, or announced, may be inferred from the circumstances; and the evidence thereof, in this case, is held to be sufficient.

3. **Parties — Parent and Child — Son-in-Law — Contracts — Assignment of Right—Judgments.**

   Where the daughter and son-in-law have a valid claim against the father for services rendered him while living as a member of his family, and the daughter assigns her claim to her husband, who sues alone, though his recovery is sustained, yet she should have become a party to the action, in order that she may be bound by the judgment.

ELLIS *v.* COX.

APPEAL by defendants from *Webb, J.*, at the March Term, 1918, of RANDOLPH.

This is an action by J. M. Ellis, administrator of Seth Cox, against the distributees and heirs of the said Cox for an account and settlement of the estate.

The controversy between the parties was as to a claim of the said Ellis individually for the services of himself and wife, which was sent to a referee for trial and heard in the Superior Court on exceptions to the report.

The referee found the following facts in addition to those fixing the value of the services and dealing with certain other charges:

1. Seth Cox, plaintiff's intestate, died on 21 March, 1914, and the plaintiff, J. M. Ellis, qualified and gave bond as his administrator on 6 April, 1914.

2. About thirteen years before his death Seth Cox became totally paralyzed on one side and was an invalid from that time until his death. The plaintiff, J. M. Ellis, had married the intestate's youngest daughter and was living at Mineral Wells, in the State of Texas, earning a salary of $50 per month as clerk in a furniture establishment when, about two years after the said intestate was stricken, he and his wife and their oldest and then only child came to visit her parents, prepared to stay and take care of them if needed. At the request of Seth Cox, the plaintiff J. M. Ellis, instead of returning to Mineral Wells, Texas, moved to the farm of the said Seth Cox and lived there continuously with the said Seth Cox until his death as aforesaid, having the complete control and management of the farm and looking after and caring for the said Seth Cox.

3. That during the three years next preceding 21 March, 1914, J. M. Ellis and Elvira Ellis, his wife, looked after the said Seth Cox, who was sick and confined to his bed practically all the time. They nursed him, cared for him like a child, supplied his wants, and performed all such services and rendered all such assistance needed under the circumstances, except for some assistance rendered by Mary E. Cox, the wife of the said Seth Cox, who was herself an old woman of feeble health, capable of assistance to a limited extent only. That the paralysis of the deceased was of such character as to render him incapable of control over himself, and on account thereof the task of nursing and caring for him was made exceedingly unpleasant and burdensome. During the period of three years the deceased was at times irritable and frequently required care and attention both day and night. The plaintiff and his wife, one or both, provided the food for the intestate, whose appetite was generally good notwithstanding his practically helpless condition, cooked it for him, built his fires, and attended to giving medicine pre-

scribed by physician. The attention required was such as to confine the said J. M. Ellis and his wife very closely at home, so that they never had an opportunity of going away together and rarely were either of them able to get away except in cases of necessity.

4. The entire time of J. M. Ellis was not taken up in services rendered the estate as he had time to see to the cultivation of the farm and make necessary repairs and improvements thereon, together with such incidental work as was required.

5. The entire time of the plaintiff's wife was not taken up in serving the intestate inasmuch as she had time to and did wash and cook for the whole family and do such other work as was necessary about the household.

6. That J. M. Ellis and his wife and children lived with the said Seth Cox and wife, Mary E. Cox, all as members of one and the same family after he moved from Mineral Wells, Texas, up until the death of the said Seth Cox, on the farm owned by the intestate.

7. There was no express contract between J. M. Ellis and wife, or either of them, and Seth Cox with respect to the performance of the services they did perform, or with respect to compensation therefor, but the said services were rendered and received in such manner and under such circumstances as created an implied contract on the part of the said Seth Cox to pay for said services what they were reasonably worth.

18. That Elvira Ellis, plaintiff's wife, has never made or presented any separate claim or demand for the services rendered by herself to the said deceased, but she gave her service to her husband, J. M. Ellis, with her right of action therefor.

Exceptions were filed to the report, which were duly considered, and the court approved and confirmed the findings of fact and rendered judgment in favor of the claim of said Ellis, and the defendants excepted and appealed.

J. A. Spence and Hammer & Moser for plaintiff.
Brittain & Brittain and Parker & Long for defendant.

ALLEN, J. The principle is fully recognized in this Court that services rendered to the parent by a child while a member of the family are presumed to be gratuitous, and that no recovery can be had therefor, in the absence of an express contract, when nothing appears except the relationship and the performance of the services (*Abitt v. Smith*, 120 N. C., 392; *Hicks v. Barnes*, 132 N. C., 150, and other cases), and it has been held that a son-in-law who lives with his mother-in-law as one family comes within the principle. *Callahan v. Wood*, 118 N. C.,

752. Circumstances may, however, exist from which the jury or a referee may find as a fact an intent on the one part to charge and on the other to pay for the services, and upon this being found the law implies a contract to pay the reasonable value of the services, and this is the meaning of the finding by the intelligent referee that "the said services were rendered and received in such manner and under such circumstances as created an implied contract on the part of the said Seth Cox to pay for said services what they were reasonably worth," and the defendants admit there was evidence to support the finding, if one of fact.

The intention of parties is "not the object of sense," "it cannot be seen or felt," "is not usually announced," and "will be gathered from all the circumstances." *S. v. McBryde,* 97 N. C., 397.

In this case the evidence is not sent up because of the admission of the parties that there was evidence to sustain all the findings of fact, and therefore we cannot see all the circumstances apparent to the referee, but it does appear that the daughter had left her father's home and married; that she and her husband had moved to another State, where the husband was engaged in business, indicating the purpose to establish a permanent home there; that finding that Seth Cox, the father, had become paralyzed they came to this State to visit him, and remained at the request of the father as one of the family and performed the services for which a recovery is sought, which brings the case within the principle of *Winkler v. Killian,* 141 N. C., 575, in which a recovery by a son for services to the mother was sustained, and the Court said: "Counsel have not cited, nor have we been able to find, any case in this State where an adult child making a claim for services had removed from the home and family of the parent, had married and assumed the care and responsibility of a family of his own for and during the time the services were rendered. Courts of the highest authority in other jurisdictions, however, have dealt with the matter, and have held that in such cases the general rule obtains that where such services are rendered and voluntarily accepted, a promise to pay therefor will be implied."

The differences between the *Winkler case* and this are that in the first the son was not living in the same house, but near her house, which is a circumstance in favor of the defendant's contention, and in this the son-in-law and his wife had abandoned their home in another State at the request of the father to serve him, which favors the position of the plaintiff, but neither circumstance is conclusive, but are relevant on the intention of the parties.

The findings of the referee, supported by evidence, are conclusive of

the right of the husband to recover for the earnings of the wife, but she ought to be made a party to the record in order that she may be bound by the judgment.

Affirmed.

R. B. HORN v. W. J. POINDEXTER.

(Filed 11 December, 1918.)

1. Contracts—Breach—"Liquidated Damages"—Interpretation.

While a stipulation for "liquidated damages" for the breach of a contract may be enforcible in the amount stated, in proper instances, the mere use of this expression by the parties to the contract does not necessarily control, for the true intent and meaning of the contract must be determined by a proper consideration of the instrument as a whole the situation of the parties, the subject-matter of the contract and of all the circumstances surrounding its execution.

2. Same—Penalty.

Where the nature and terms of a contract and the conditions and circumstances relevant to its interpretation afford sufficient data for a definite and satisfactory estimate of the damages which may arise from its breach, the fixing of them in an amount stated in the contract, designating them as "liquidated damages," does not of itself control the interpretation, the tendency of the courts being to regard these stipulations as in the nature of a penalty, and to uphold the fundamental principal of just compensation wherever there is such a marked disproportion between the amounts fixed upon and the damages likely to arise as to render them arbitrarily unreasonable or oppressive or likely to become so in the course of adjustment, without reference to the actual loss sustained.

3. Same—Pleadings—Judgments—Default and Inquiry.

In an action upon a bond to secure the defendant's performance of the remaining portion of the plaintiff's contract, covering a term of years, for carrying government mail, as sublessee, with the approval of the government, the contract sued on stipulated a certain amount as "liquidated damages," to be recovered upon its breach by the defendant: *Held*, by a proper interpretation of the contract, the stated amount was in the nature of a penalty, within which a recovery for actual damages may be had upon its breach, the same being of a nature to be readily ascertained or determined upon; and a final judgment by default for the want of an answer was improperly entered, the proper one being by default and inquiry.

ACTION tried before *Cline, J.*, at August Term, 1918, of YADKIN.

The action is to recover on a bond in the sum of $800 given by defendant to plaintiff to secure the performance of the remaining portion of a mail contract sublet to defendant by plaintiff with the assent of the Government.

In plaintiff's complaint, duly verified, it is alleged: "That plaintiff, in 1916, entered into a contract with the Government to carry the mail from East Bend, N. C., to Donnaha and back, twelve times a week, for four years, from 1 July, 1916, to 30 June, 1920, and carried same till 1 December, 1917; that plaintiff then, with assent of the Government duly given, sublet the route to defendant, who agreed to carry the mail for the remaining portion of said term, at $494.63 per annum, and entered into a written contract to that effect, same containing defendant's bond of $800 to secure performance, and stated in the contract to become, in case of breach, 'liquidated damage, and not a penalty'; that on 1 June, 1918, defendant failed to refuse further to carry out the contract, compelling plaintiff to again undertake same, to his damage."

At the close of the return term there was judgment by default final for the $800, and defendant having duly excepted appealed.

A. E. Holton and Benbow, Hall & Benbow for plaintiff.
Jones & Clement and Williams & Reavis for defendant.

HOKE, J. It is recognized that parties may stipulate in their contracts for a sum certain as "liquidated damages" in case of breach, and have such stipulation enforced if that is the true significance of the agreement. Such significance, however, is not controlled by the fact that they have seen fit to designate the same as "liquidated damages," but the true intent and meaning of the contract must be determined by a proper "consideration of the instrument as a whole, the situation of the parties, the subject-matter of the contract, and all the circumstances surrounding its execution." 19 A. & E. Enc., p. 398; *Lindsay v. Anesly*, 28 N. C., 186.

A provision of this kind is more appropriate and more likely to be upheld when the damages are "uncertain in their nature or difficult or impossible to estimate with definiteness by reference to pecuniary standards," as instanced in breaches of promise of marriage or in the sale of a business and good will with a stipulation against further competition by the vendee, and the like. But in cases where the nature and terms of the contract and the conditions and circumstances relevant to its interpretation afford sufficient data for a definite and satisfactory estimate of the damages, the tendency is to regard these stipulations for a fixed sum to cover unascertained damages, as in the nature of a penalty, and, upholding the fundamental principle that a just compensation is the result to be sought, they have been so construed by the courts wherever there is such marked disproportion between the amount fixed upon and the damages likely to arise as to render them unreasonable or oppressive, or they may become so in the course of adjustment, because,

with the loss the correct ascertainment readily ensuable, it is evident from a perusal of the contract that the amount has been arbitrarily adopted without reference to the loss actually suffered and liable to arise in case of breach. In Sherman, it is laid down as a rule of construction on this subject, in Hale on Damages, p. 128, that, where the stipulated sum to be paid in a breach of the contract is of such a nature that the damages arising from a breach may be either much greater or much less than the sum fixed it will be construed to be a penalty. And in 8 R. C. L., p. 202, it is said "That the sum named will be regarded as a penalty if the defaulting party is liable for the same amount, whether the breach is total or partial."

Under these general principles, approved by well-considered decisions here and in other States, we are of opinion that this $500 is a penal sum to secure plaintiff in the amount of damages actually suffered by the breach, and, as the facts stand in the complaint, only a judgment by default and inquiry should have been entered. *Greenway v. Edwards*, 164 N. C., 324; *Wheeler v. Hamlin Co.*, 168 N. C., 87; *Burrage v. Crump*, 48 N. C., 100; *Hemingway v. Walker*, 47 N. C., 15; *Carolina v. Kemper*, 47 Kan., 126.

Not only is the character and nature and cost of this service fully known, furnishing full data for the correct ascertainment of the damage but, under a different construction, the $500 is due and recoverable though defendant had been in default only for the last few days of the period. This would be to make the contract both unreasonable and oppressive and affords convincing evidence, as stated, that it should be properly considered as a penalty.

This will be certified that the judgment of default final be set aside and further proceedings had in accordance with law.

Error.

C. E. THOMASON AND J. E. CURRY v. J. C. BESCHER AND W. M. BESCHER.

(Filed 11 December, 1918.)

1. Contracts — Unilateral Contracts — Options — Seals — Vendor and Purchaser — Consideration — Timber — Specific Performance.

Payment of the nominal consideration recited in a contract, under seal, to convey the timber upon lands described, is not necessary to have been made to prove that the one taking the option and relying upon performance of its terms, when he has exercised the right within the terms of the agreement, tendered the agreed purchase price within the stated period, and has at all times been ready, able and willing to comply with

his obligations thereunder; and the proposed seller may not avoid his own obligations by notifying the proposed purchaser beforehand, or at any time within the life of the option, that the same is withdrawn by him, and successfully set up a failure of consideration as a defense to the suit for specific performance.

2. Contracts—Unilateral Contracts—Seals—Options—Timber—Specific Performance.

Whether the seal to a written instrument granting an option on, or unilateral contract to convey, the timber upon lands, conclusively imports a consideration, or the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instructions are considered binding agreements by the common-law courts, apart from the question of whether the nominal consideration therein recited has in fact been paid, and are likewise enforcible in the courts of this State, there being no statute on the subject and nothing unconscionable or inequitable in the contract sought to be enforced.

3. Contracts — Unilateral Contracts — Options — Consideration — Purchase Price.

Where the proposed purchaser, under a written unilateral contract to convey land, under seal, has availed himself of his option, and has performed as far as possible the conditions required of him, and sues for specific performance upon the breach of the contract by the proposed vendor, the consideration is not restricted to the seal or the nominal amount usually present in bargains of this character, but extends to and includes the purchase price agreed upon.

4. Contracts—Options—Unilateral Contracts—Timber—Deeds and Conveyances—Vendor's Purchaser—Parties—Specific Performance.

Where the proposed vendor in a contract to convey lands has thereafter sold a part of the lands to another, and the proposed purchaser has accepted the option, made tender of the purchase price, and has in all other respects complied with its terms, and brings suit against the proposed seller and his vendor for specific performance, standing always ready, able and willing to perform his obligations under the contract, and defendants deny all liability thereunder: *Held*, the plaintiff is entitled to enforce specific performance of the entire contract against both the proposed seller and his vendor. *Ward v. Albertson*, 165 N. C., 218, cited and applied.

ACTION to enforce specific performance of a contract to sell timber, tried before *Long, J.*, and a jury, at July Term, 1918, of RANDOLPH.

There were facts in evidence tending to show that on 18 June, 1918, J. C. and W. M. Bescher, two tenants in common in a tract of land, entered into a written contract, under seal, giving plaintiff Thomason the option to purchase the timber thereon, at $6,000, within sixty days, or by 18 August, 1917, the said contract being in terms as follows:

"Know all men by these presents, that in consideration of the sum of one dollar to us in hand paid by C. E. Thomason, of Davidson County,

N. C., the receipt of which is hereby acknowledged, we, J. C. and W. M. Bescher, do hereby contract and agree with said C. E. Thomason to sell and convey unto said C. E. Thomason and his heirs and assigns all that certain tract or parcel of timber and roads over land, with sawmill sites, situate, lying and being in Concord Township, Randolph County, adjoining the lands of B. M. Pierce and others, and known as the John S. Bescher place, and containing 715 acres, more or less, and that we will execute and deliver to said C. E. Thomason and his heirs and assigns, at his or their request, on or before 18 August, 1917, a good and sufficient deed for the said timber and roads and mill sites with full covenants and warranty, provided and upon condition, nevertheless, that the said C. E. Thomason, his heirs and assigns, pay us or our representatives or assigns the sum of $6,000 in cash, or equivalent, it is understood and agreed that the said sale is to be made at the option of the said C. E. Thomason or his heirs or assigns, to be exercised on or before 18 August, 1917.

"And it is further understood and agreed that if the said C. E. Thomason and his heirs and assigns shall not demand of us the deed herein provided for and tender payment as herein provided for and on or before said 18 August, 1917, then this agreement is to be null and void, and we are to be at liberty to dispose of the timber to any other person or to use it as we may desire in the same manner as if this contract had never been made; but otherwise this contract is to remain in full force and effect.

"And to the true and faithful performance of this agreement we do hereby bind myself and my heirs, executors, administrators and assigns.

"Witness our hands and seals, this 18 June, 1917. All old-field pine is hereby excepted, all other included."

Coplaintiff J. F. Curry having acquired one-half interest in said contract prior to institution of suit. That prior to 23 June, 1917, plaintiff Thomason, then holding the contract, notified one of the defendants that he would take the timber, etc. . . . That plaintiff tendered the purchase price on 7 August, 1917, and had always been ready and willing to pay it. There was denial of obligation on the part of defendants, with evidence tending to show that before any acceptance or notice thereof defendants had, in writing, notified plaintiffs that they elected to terminate the contract.

On issues submitted, the jury rendered the following verdict:

1. At the time of the execution of the option on 18 June, 1917, and as a consideration therefor, did the plaintiff C. E. Thomason pay the one dollar to the defendants, as recited in the said option? Answer: "No."

2. Did the plaintiffs thereafter notify the defendants, or either of

them, and prior to 23 June, 1917, that they would take the timber, roads and mill sites, under the terms of the said option set up in the complaint and would be down the following week to pay the price and take the deed therefor? Answer: "Yes."

3. Were the plaintiffs at all times able and willing to pay the purchase price of $6,000 for the property, as recited in the option, in event deed was made therefor? Answer: "Yes."

4. Did the defendants on 23 June, 1917, serve the plaintiffs with the following notice: "This is to notify you that the option given you on your timber, Randolph County, on Monday, the 18th of June, is withdrawn and we will not convey the timber according to its terms"? Answer: "Yes."

Judgment on verdict for plaintiff, and defendant excepted and appealed.

Raper & Raper for plaintiff.
J. A. Spence for defendant.

HOKE, J. It is the accepted principle of the common law that instruments under seal require no consideration to support them. Whether this should rest on the position that a seal conclusively imports a consideration or that the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instruments are held to be binding agreements enforcible in all actions before the common-law courts.

Speaking to the question in *Harrell v. Watson,* 63 N. C., 454, *Pearson, C. J.,* said: "A bond needs no consideration. The solemn act of sealing and delivering is a deed—a thing done which, by the rule of the common law, has full force and effect without any consideration. *Nudum pactum* applies only to simple contracts."

A similar position is stated with approval in Prof. Mordecai's Lectures, at p. 931, and Dr. Minor in his Institutes, pt. 1, vol. 3, p. 139, says: "In all contracts under seal a valuable consideration is always presumed, from the solemnity of the instrument, as a matter of public policy and for the sake of peace, and presumed conclusively, no proof to the contrary being admitted either in law or equity so far as the parties themselves are concerned."

While there is much diversity of opinion on the subject, we think it the better position and sustained by the weight of authority that the principle should prevail in reference to these unilateral contracts or options when, as in this case, they take the form of solemn written covenants under seal, and its proper application is to render them binding agreements, irrevocable within the time designated, and that the

stipulations may be enforced and made effective by appropriate remedies when such time is reasonable and there is nothing oppressive and unconscionable in the terms of the principal contract.

In *Watkins v. Robertson,* 105 Va., 269, the question is directly presented, and in a convincing and learned opinion by *Judge Cardwell* the conclusion of the Court on the subject is announced to the effect: "That an option under seal for the sale of shares in a joint stock company is a binding offer from which the promisor cannot recede during the time stipulated for in the option, and if accepted during that time constitutes a contract the specific performance of which a court of equity will compel. The option is in the nature of a continuing offer to sell, and, being under seal, must be regarded as made upon a sufficient consideration, and no proof to the contrary will be received at law or in equity."

In *Willard v. Tayloe,* 75 U. S., 557, *Associate Justice Field,* delivering the opinion, it was held, among other things: "A covenant in a lease giving to the lessee a right or option to purchase the premises leased at any time during the term is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede." And the position is approved by other courts of the highest authority and by writers of established repute. *O'Brien v. Boland,* 166 Mass., 481; *Weaver v. Bunn,* 31 W. Va., 736; *McMillan v. Ames,* 33 Minn., 257; Pomeroy on Contracts, sec. 387, note 1; 9 Cyc., 287.

In the citation to Pomeroy, a work of recognized merit, chiefly on the doctrine of specific performance, it is said in the note referred to: "If the unilateral contract is sealed and the common-law effect of the seal has not been taken away or changed by statute, it appears that the promissory offer contained in the writing cannot be recalled before the time for acceptance has expired." And in 9 Cyc.: "The common-law rule that when an offer is made under seal it cannot be revoked, applies to options given under seal. The seal renders a consideration unnecessary, and if the option is exercised by acceptance of the offer within the time limited the agreement will be specifically enforced or damages may be recovered for its breach notwithstanding an attempted revocation."

We are not unmindful of the position that in equity causes the Court looks beyond the form and will usually refuse to exert its powers in aid of a sealed instrument, its collection and enforcement, except when there is a valuable consideration. In our own Court, the case of *Woodal v. Prevatt,* 45 N. C., 199, being an apt illustration of the principle. But these options, containing a continuing offer to sell and constituting a contract, binding on the parties because in the form of a covenant under seal, serve their purpose in keeping the offer open for

the time specified and preventing a withdrawal by the vendor. On acceptance and offer to perform within the time, a bilateral contract is then constituted which, on breach, is enforcible by appropriate remedies, legal or equitable. And in case of action for specific performance, the consideration is not restricted to the seal or the nominal amount usually present in these bargains, but extends to and includes the purchase price agreed upon. This position is recognized with us in the case of *Ward v. Albertson,* 165 N. C., 218 and 222.

Speaking to the subject, the Court said: "In reference to the $5 paid by plaintiff as the consideration for his interest, it is the accepted position in this State that 'a binding contract to convey land, where there has been no fraud, mistake, undue influence, or oppression, will be specifically enforced, and, as a rule, the mere inadequacy of price, without more, will not affect the application of the principle' (*Combes v. Adam,* 150 N. C., 64, citing *Boles v. Candle,* 133 N. C., 528, and *Whitted v. Fuquay,* 127 N. C., 68); and where the contract has been perfected by acceptance within the time or proper tender of performance, on suit for specific performance, the real consideration is the contract price, which must be paid before the interest is finally acquired, in this instance the $1,000, and as to the option itself, which only provides for holding the privilege open for a short period of time and involving also the opportunity to effect a sale by the potential vendor, the $5 paid may very properly be held as a sufficient consideration to bind the party (*Alabama Ry. v. Long,* 158 Ala., 301; *Ross v. Parks, supra; Smith v. Bangham,* 156 Cal., 359; Elliott on Contracts, sec. 232); and there is high authority for the position that in States where this matter has not been regulated by statute, the seal itself conclusively imports a consideration. *Watkins v. Robinson,* 105 Va., 269; *Willard v. Taylor,* 75 U. S., 557; *Adams v. Canal Co.,* 230 Ill., 469." And the statement, we think, presents the correct concept of these suits and is in accord with the authorities on the subject.

On the same question in the *McMillan v. Ames,* 33 Minn., *supra, Vanderburg, J.,* delivering the opinion, said: "It is true that equity will not lend its auxiliary remedies to aid in the enforcement of a contract which is inequitable, or is not supported by a substantial consideration, but at the same time it will not on such grounds interfere to set it aside. But no reason appears why equity might not have decreed specific performance in this case (had the land not been sold), because the substantial and meritorious consideration required by the Court in such case would consist in that stipulated in the instrument as the condition of a conveyance, performance of which by the plaintiff would have been exacted as a prerequisite to relief so as to secure to defendant mutuality in the remedy and all his rights under the contract." And

see, also, *Woodruff v. Woodruff,* 44 N. J. Eq., p. 349; 6 Pomeroy's Eq., sec. 773.

As heretofore stated, there are opposing decisions on the question, holding that a written option without valuable consideration, though under seal, may be recalled at any time before notice of acceptance given. Some of these, as pointed out in *Watkins v. Robertson, supra,* are dependent on statutes which change or modify the effect given to seals under the principles of the common law. In others, there being nothing in the record to present it, the mind of the Judges was not specially called to the distinctions existent and usually observable between a mere offer to sell without consideration and without seal and one that is effective as a binding agreement by reason of the seal. This is true in several cases in our own Court, as in *Timber Co. v. Wilson,* 151 N. C., 154, and *Paddock v. Davenport,* 107 N. C., 710. In both of these cases, however, it appears that there was notice of acceptance duly given within the time, thus constituting a bilateral contract between the parties, and the question of the effect of a seal on such contracts was in no way presented; and so in the well-considered case of *Winders v. Kenan,* 161 N. C., 628, there was a valuable consideration for the option, and relief was denied because there was no offer to perform within the time as the contract required.

So far as examined, we have found no case with us in which the question has been directly considered, and under the principles stated and on the facts of this record we are of opinion, and so hold, that the defendants are bound by their covenant under seal and not at liberty to withdraw their offer before the expiration of the time agreed upon.

The verdict having established that before any attempted withdrawal by defendants, plaintiff had notified one of the parties of acceptance would in any event be entitled to judgment as to that interest. And it further appearing that plaintiff has been at all times ready and able to comply, tendering the entire purchase money, at latest by 7th August, that defendants refused to accept the same and deny any and all obligation under the alleged contract, plaintiff, as held in *Ward v. Albertson, supra,* and other cases of like import, is entitled to have specific performance as to both interests, and the judgment to that effect is affirmed.

No error.

J. W. HOLLINGSWORTH v. W. H. ALLEN.

(Filed 11 December, 1918.)

Limitation of Actions — Mutual Accounts — Reciprocal Credits — Store Accounts.

To constitute a mutual account, so that the last item of charge thereon will repel the bar of the statute of limitation, it must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of our decisions nor the statute applicable. Revisal, sec. 375.

ACTION, tried before *Cline, J.*, and a jury, at July Term, 1918, of CATAWBA.

The action is to recover on an alleged open and running account, extending through the years 1906–13, and showing a balance due on statement rendered of $286.95, for which suit is brought.

There was evidence on the part of plaintiff that he, in the years covered by the account, resided and did business in Franklin County, where defendant also resided, and during said years he sold and supplied to defendant the goods charged to him and the balance due, after deducting payments thereon, also entered on the account, amounted to $286.95, as stated. The statement and evidence shows that the bulk of the account accrued in 1912 and the years before that, most of it before. The items of charge insisted on in 1913 are one box of oranges of date 21 November, 1913, and two boxes of 24 December, 1913, one of which was returned. It further appeared that plaintiff instituted action on the account against defendant in Franklin County in October, 1916; that the same pended in said county till February Term, 1917, when a nonsuit was taken, and plaintiff having in the meantime moved to Catawba County commenced present suit in the latter county in July, 1917.

There was denial of the account and plea of the statute of limitation, and on issues submitted, the jury rendered the following verdict:

1. Is plaintiff's right of action barred by the statute of limitations? Answer: "No."

2. In what sum is defendant indebted to plaintiff? Answer: "$285.95."

Judgment on the verdict, and defendant excepted and appealed.

W. C. Feimster for plaintiff.

W. A. Self and W. H. Yarborough for defendant.

HOKE, J. There has been no payment on this account within three years prior to the institution of the original suit, the return of the box

of oranges and the evidence relating thereto showing merely that these were not received or purchased by defendant, and the statute of limitations having been plead, a recovery for the entire amount has been obtained on the theory that this was a running and mutual account between the parties, and that the entire claim is saved from the operation of the statute by reason of the fact that the last item, a box of oranges, was on 24 December, 1913, and within the three years next before suit brought.

In that aspect of the case, the charge of his Honor on the first issue was as follows: "If you find by the greater weight of the evidence that there was a running account, store account, between this plaintiff, J. W. Hollingsworth, and the defendant, W. H. Allen, down at Louisburg, that Mr. Allen bought goods, fruits and groceries, and things of that sort, from time to time from Mr. Hollingsworth on credit, and items are charged to him, and that now and then he made payments to the plaintiff and in that way there was a running account from year to year between them; if you find that, and if you further find from the greater weight of the evidence there was actual sale of a box of oranges to Mr. Allen under this running account on 24 December, 1913, and then you should further find that the suit in Franklin County on this account was begun in October, 1916, and you should then find that it was less than three years since the last item of the running account, the court instructs you the action would not be barred by the statute of limitations, and you would answer the first issue 'No.' If you fail to find it was not barred, you will answer this issue 'Yes.'"

A running and mutual account within the meaning of these issues is one growing out of reciprocal dealings between the parties in which each extends credit to the other and with the understanding, express or implied, that, on adjustment had, the items supplied and charged shall be allowed as proper credits.

A very satisfactory, and we think a correct, definition of mutual accounts is given in 21 A. E. Enc. (2d Ed.), p. 244, as follows: "A mutual account is a course of dealing where each party furnishes credit to the other on the reliance that, upon settlement, the accounts will be allowed so that one will reduce the balance due the other."

The principle embodied in this statement is upheld with us in *Green v. Caldcleugh*, 18 N. C., 320-322, where *Daniel, J.*, discussing the subject, said: "It has been decided that if there be mutual running accounts on each side, then a new item, in either account, within three years may take the whole account, on both sides, out of the statute." And the position is again affirmed, in substance, in *Stokes v. Taylor*, 104 N. C., 394, where it was held: "That in order to constitute a running account, there must be an understanding or agreement between the

parties, express or implied, from the nature of the dealings, that the items of an account shall be applied as payments upon the others. Mere disconnected and opposing demands are not sufficient."

The case of *Mauney v. Coit*, 86 N. C., 464, is not opposed, but in illustration of the position, and the principle is very generally approved by well-considered decisions and text-writers on the subject. *Norton v. Larco*, 30 Cal., 127; *Hodge v. Manly*, 25 Vt., 210; *Pengra v. Wheeler*, 24 Ore., 532; 1 R. C. L., 205; 1 Cyc., 363. And in accounts of this character, whether the same are kept by both of the parties or by one, with the knowledge and assent of the other, it is well understood that the balance due is the proper amount of the claim, and, for the purposes of the statute of limitations, the cause of action takes its rise from the date of the last item.

A very correct statement of the position appears in our statute on the subject, Revisal, sec. 376, as follows: "In an action brought to recover a balance due upon a mutual, open and current account, when there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the latest item proved in the account on either side." Under the authorities referred to, however, and many others could be cited, such a principle does not apply to a case of opposing but unrelated demands between the parties, nor to an ordinary store account, though open and continued, where the credit is all on one side and the only items of discharge consist in payments on account. In this last case, unless there has been a payment within the statutory period or some binding recognition of the account within such time, the statute runs from the date of each item. And the charge of his Honor, which, on the record, as we understand it, extends the principle applicable, in case of mutual accounts, to an ordinary store account, must be held for error.

This will be certified that a new trial be had, and if the facts are as now presented, recovery can only be had for the items of account within the statutory period.

New trial.

J. W. YOUNG ET AL. v. H. F. HARRIS ET AL.

(Filed 11 December, 1918.)

1. Estates—Remainder—Acceleration—Wills.

The doctrine of acceleration, by which the enjoyment of an expectant interest in lands is hastened, rests upon the theory that such enjoyment is postponed for the benefit of a preceding vested estate or interest, and that on the destruction or determination of such preceding estate before it

would regularly expire, the ultimate takers should come into the present enjoyment of their property; and this doctrine applies to appropriate expressions in a will, when a contrary intent does not appear by a proper interpretation of its terms.

2. Same—Widow's Dissent.

Where the doctrine of acceleration applies to the ulterior devisees under a will giving the testator's wife his real property for life or until she marry, her dissent to the will will have the same effect.

3. Same—Dower—Ultimate Devisee.

A devise in trust to the benefit of the testator's wife for life or until she remarry, giving her the actual possession and occupancy of the farm and house in which the testator had lived, with implements required for the cultivation of the farm, but with limitation over to his heirs at law, for a division among whom the trustees shall immediately take possession upon the happening of either event: *Held*, the intent of the testator, nothing else appearing, was to postpone the distribution among the ultimate takers for the accomplishment of his primary purpose of providing for his wife during her life or widowhood, and upon the dissent of the widow from the will, the doctrine of acceleration will apply.

4. Estates — Remainders—Wills—Dissent—Dower—Acceleration—Ultimate Devisee—Deeds and Conveyances.

Where the widow has dissented from the will of her husband and takes dower in lieu of the lands devised for her life or widowhood, thus accelerating the earlier vesting of the estate in the ultimate devisee, the deed to the land made by the ulterior devisee is subject to the dower right, and at her death his grantee acquires the title.

ACTION, tried before *Justice, J.*, and a jury, at March Term, 1918, of YANCEY.

The action was instituted by plaintiffs, who are at present the heirs at law and next of kin of C. F. Young, deceased, against the defendants, who hold the lands under a deed from J. P. Young, widow, now deceased, of said C. F. Young, to recover the portion of the lands formerly owned by C. F. Young and which was assigned as dower to his widow, she having entered formal dissent from her husband's last will and testament on 26 August, 1887, after his death on 3d of the next preceding July.

It further appeared that said C. F. Young died duly domiciled in Yancey County on 3 July, 1887, owning this and much other land and personal property, leaving a last will and testament making disposition of the same; that such will was duly admitted to probate, and thereafter his widow, Dullie Young, entered her dissent, as stated, and her dower was assigned in a part of the realty of said estate and covering the land in controversy.

Admissions pertinent to inquiry appear of record as follows: "That summons in the original between plaintiffs and defendants was issued

30 October, 1914, and was duly served; that plaintiffs submitted to a voluntary nonsuit at the August Term, 1916, and judgment of nonsuit was duly signed at said term; that this action was instituted on 12 March, 1917, as appears by reference to the summons in this cause; that J. P. Young was the father and only heir-at-law of C. F. Young at the time of the death of C. F. Young. It is admitted by the defendants that the plaintiffs in this action are some of the heirs at law of C. F. Young, deceased; that both parties claim under C. F. Young the common source of title; that C. F. Young died on 3 July, 1887; that J. P. Young died 26 March, 1888; that Dullie E. Young, the widow, died 4 October, 1914; that defendants are in possession of the lands described in the complaint; that the lands included in the boundary of the dower laid off to Mrs. Dullie E. Young, widow of C. F. Young, is the same lands as that described in the complaint and the same lands mentioned in the will of C. F. Young as the house and farm, or home place of the said C. F. Young, and the same lands contained in the deed to Mrs. Dullie Young."

Upon this evidence and the admissions above set forth, plaintiff having rested, on motion, there was judgment of nonsuit, and plaintiffs excepted and appealed.

Charles Hutchins, Thomas A. Jones, G. E. Gardner, and Merrimon, Adams & Johnston for plaintiffs.

J. W. Pless, J. Bis Ray, and Hudgins, Watson & Watson for defendants.

HOKE, J. The will in question of Creed F. Young, former owner of the property, and duly admitted to probate, provides that, subject to payment of debts and two specified legacies of $1,000 each, all of the testator's property, real and personal, shall be held by S. W. Carter and John S. McElroy, trustees, also appointed executors, for the use and benefit of his wife, Dulcena E. Young, during her widowhood, allowing her to have the actual use and enjoyment of the house and farm where testator resided, such stock and property as may be sufficient and necessary for the use of the said farm, and paying her from time to time such sums as may be necessary to her proper support, etc.; that if the wife should ever marry, the said trustees shall take immediate possession of all the property, real and personal, and distribute the same among the testator's next of kin "who would be entitled to the same at law, etc., except the two legacies, as stated, etc." And it appearing by the admissions of the parties that the widow shortly after her husband's death dissented from the will; that the father, J. P. Young, grantor of defendants, was at that time the next of kin and only heir-at-law of the

testator, we concur in his Honor's view that his deed was effective to pass the title to defendants, and plaintiffs have, therefore, been properly nonsuited.

The doctrine of acceleration, by which the "enjoyment of an expectant interest is hastened," rests upon the theory that such enjoyment having been postponed for the benefit of a preceding vested estate or interest, on the destruction or determination of such preceding estate before it would regularly expire, the ultimate takers should come into the present enjoyment of their property. Unless a contrary intent is disclosed by the terms of the will, the position is fully recognized, where a widow has dissented and, declining to take the preceding estate or interest given her by the will of her husband, has entered into the possession and enjoyment of the interests conferred upon her by the law. In that event, the widow ceases to hold under the will, and in cases like the present the decisions hold that the rights and interests of the parties must be considered and determined as if she had married or died.

Thus, in *Wilson v. Stafford*, 60 N. C., 646-649, *Battle, J.*, delivering the opinion, said: "This was a dissent of the widow and her claiming the share of the property as if he had died intestate; the effect of this upon the disposition made for his children in the will must, after the assignment of dower and giving her an equal part with the children in the personal estate, be the same as if she had died or married."

And in *Fox v. Rumery*, 68 Me., 121-129: "All the wife's interest in it is at an end as much as if she were dead. The rule is that the extinction of the first interest carved out of the estate only accelerates the right of the second taker."

And in *In re Estate of Rawlings*, 81 Iowa, 701-706, *Chief Justice Beck*, delivering the opinion, said: "The property was to be kept for the use of the wife under the will. As she refuses to take under the will, that part of the items relating to the keeping of the property cannot be obeyed and must be left out of view. The same is true as to the widow's life estate. The will provided that Ann Elizabeth Kery (Cary) and James R. Kery (Cary) shall take the property after the widow's life estate ends. But the widow refuses to take a life estate and takes dower. It clearly appears that the testator intended that the devisees just named should take the property after its enjoyment by the widow ceased and after her interest therein was terminated. He did not intend that the beneficiaries to these devisees should be under the control of his wife or should be defeated by her. Under the exercise of her option, she refuses to take a life estate, but takes the estate the law gives her. It clearly appears that the testator intended the devisees to take of the property whatever remained after the widow's right thereto terminated. The law will effectuate the intentions of the testator, if possible, and

will secure to the legatees as nearly the benefits intended by the provisions of the will in their favor as can be done. 1 Rdf. Wills (3d Ed.), 429."

On the facts of this record, there is authority tending to support the position that the ascertainment of the "next of kin," within the meaning of this will, would in any event be referred to the death of the testator. *Jones v. Oliver,* 38 N. C., 370. But conceding this to be otherwise in the present instance, not only is there nothing in the will that forbids the application of the principle of acceleration, to which we have referred, but it is clear from a perusal of the instrument that, subject to the payment of the legacies, which, on the facts presented, do not affect the question, the entire purpose in putting this estate in the hands of the trustees was to insure the proper maintenance of the testator's widow while she remained unmarried or until she died without having remarried, and that the distribution among the ultimate takers was only postponed in order the better to effect the primary purpose; and this purpose and the preceding interest conferred on the widow having been entirely removed by her dissent, the ultimate takers come into the immediate enjoyment of their rights to the extent that the same creates no interference with the interests which the law has conferred upon the widow. The father, at that time, being the sole heir-at-law and next of kin, his deed, as heretofore stated, was effective to carry the title, subject to the widow's dower, and she having died, the defendants have been properly declared the true owners.

An interesting illustration of the principles applicable, and which we hold to be controlling on the facts presented, appears in the well-considered case of *University v. Borden,* 132 N. C., 477, opinion by our former *Associate Justice Connor,* and authoritative decisions here and elsewhere are in full support of the position. *Holderby v. Walker,* 56 N. C., 46; *Adams v. Gillespie,* 55 N. C., 244; *Dale, Admr., v. Bartly,* 58 Ind., 101; *Veaton v. Roberts,* 28 N. H., 459; *Marrin v. Ledwith,* 111 Ill., 144.

There is no error in the record, and the judgment of nonsuit
Affirmed.

J. M. GALLOWAY v. FLEMING GOOLSBY.

(Filed 11 December, 1918.)

1. Pleadings—Defense—Counterclaim—Judgment.

In an action to recover a balance of the purchase price of lands, allegations in the complaint that the lands were sold as a known tract at a

certain price for the whole, which was denied by the answer, alleging the price was by the acre, overpayment, and claiming the amount thereof: *Held*, the matters alleged in the answer were those in defense, not requiring a replication in denial, and motion for judgment upon the pleadings for a counterclaim because not denied, or a requested instruction to that effect, was properly refused.

2. Contracts, Written—Lands—Parol Evidence—Contradiction.

A written contract for the sale of a known, designated and described tract of land, "containing about" a certain number of acres, at a fixed price, is not for the sale of the land by the acre, and excludes the admission of parol evidence to that effect, in the absence of fraud.

3. Contracts, Written—Evidence—Fraud—Misrepresentations—Mutual Mistake—Pleadings.

Where parol evidence is sought to vary the terms of a written contract for the sale of lands, as tending to show that the designated tract was sold by the acre, allegation with evidence that the vendor, or his agent, had represented that the land contained a larger acreage than that specified "before, at and after" the transaction, is not sufficient upon the question of fraud or mutual mistake.

4. Contracts, Written—Pleadings—Fraud.

To set aside a written instrument for the sale of lands for fraud, it is necessary for the complaint to allege an intent to defraud and deceive, with the facts necessary to constitute them, and that advantage had been taken thereof.

5. Instructions, Verdict Directing—Written Contracts—Parol Evidence.

Where a written contract is alleged and sued on, without allegation or evidence of fraud, and the evidence sought to be introduced only tended to vary the admitted writing, an instruction by the court that if the jury believed the evidence, to answer the issues in the plaintiff's favor, is a proper one.

APPEAL by defendant from *Shaw, J.*, at June Term, 1918, of ROCKINGHAM.

This is an action to recover judgment for balance due on the sale of a tract of land made by plaintiff's father and devisor to the defendant. The defendant contends that he bought by the acre, on a basis of 97 acres, and that on an actual survey since signing the contract the land contains only 81 acres, and that he has overpaid the plaintiff by mistake $17.50.

The plaintiff contends that the contract was in writing; that he sold, and the defendant bought, the "Turner Wall tract" of land for $700; that there is no mention of the price per acre, which is stated to be "$700, the price of the land."

Deducting the payments made, the difference between $700 and the amount paid, the balance due is $206.35, with interest from 17 June, 1918, for which amount there was verdict and judgment.

The contract for the sale of the land is as follows:

MADISON, N. C., 15 September, 1906.

This paper witnesses a contract for the sale and purchase of land by and between John M. Galloway, first party, and Fleming Goolsby, second party, both of Rockingham County, North Carolina, as follows:

The tract of land is commonly called the "Turner Wall tract," and is at present occupied by him as tenant. It lies in Huntsville Township, directly south of the public road leading from Wentworth to Rocky Springs, adjoining the lands of T. B. Knight, Susan Roberts, Fleming Goolsby, the Oliver land, and others, containing about 97 acres. The price of the land is $700; $100 is paid in cash, the receipt of which is hereby acknowledged; $100 is to be paid 1 May, 1907, 1908, 1909, 1910, 1911, 1912, with privilege to second party of paying it all at any time, all deferred payments bear interest from the date of this contract at the rate of 6 per cent per annum, failure to make a payment at the time specified makes the whole amount unpaid due at once. On completion of the payments above specified, first party binds himself, heirs and personal representatives, to make the second party a general warranty deed of said land. Possession given at once to second party, with the right of collecting the rents and the crops of 1906.

Witness our hands and seals.

FLEMING GOOLSBY. (*Seal*)
JOHN M. GALLOWAY. (*Seal*)

The jury found upon the issues submitted that the plaintiff's testator and defendant made the contract for the purchase of the land as set out in the written agreement, and the defendant obtained possession thereunder, and that the plaintiff is ready, able and willing to convey to the defendant title to the same, and find that the balance due is $206.35, with interest from 17 June, 1918. It was agreed by the parties that this was the correct amount, unless the defendant was entitled to an abatement in the price by reason of the shortage in the acreage.

From the judgment on the verdict the defendant appealed.

P. W. Glidewell and C. O. McMichael for plaintiff.
J. R. Joyce and M. F. Douglas for defendant.

CLARK, C. J. The assignments of error are:

1. That the court erred in refusing to give the defendant judgment on the pleadings because the plaintiff did not reply to the defendant's further answer containing the counterclaim for an abatement in price because of shortage in the acreage, and the second assignment of error

is for refusal to instruct the jury that "for lack of such reply, the counterclaim must be taken as true without any evidence."

The complaint sets out the contract, which is in writing, and alleged that $700 was the amount due, less the payments made, and that the land was sold as a tract and not by the acre. The answer alleged that the agreement was by the acre, and that therefore the land had been fully paid for. This was not a counterclaim, but a defense, and the plaintiff was not called upon to repeat what he had already alleged in his complaint. If the contract had been as the defendant alleged, the defendant might have asked for the recovery of $17.50 overpayment, but he does not do so, and on the finding of the jury on the first issue there could have been no recovery even of that amount.

Assignment of error 3 was for refusal to charge that the land described in the complaint was purchased by the acre, and that the number of acres in the tract was 81. The court properly refused to so charge. The contract was in evidence and was in writing, and stated that the land sold was the Turner Wall tract, describing it, "containing about 97 acres," and added "the price of the land is $700." This could not be varied or changed by parol testimony, and the court properly refused to charge that the evidence of the defendant should be taken as true.

In *Smathers v. Gilmer*, 126 N. C., 757, the Court said, as quoted in *Stern v. Benbow*, 151 N. C., 462: "In a contract to convey, or a conveyance of land, if there is a shortage in the number of acres, the grantee is not entitled to a *pro rata* abatement in the purchase price unless the vendee has taken a guarantee as to the number of acres." See, also, citations to both these cases in the Anno. Ed.

In *Bethell v. McKinney*, 164 N. C., at p. 78, it is said: "The other exception is to decreeing an abatement by reason of the alleged shortage in the acreage. As to that, the law in this State is well settled. In *Smathers v. Gilmer*, 126 N. C., 757, the Court held that where a definite tract of land was sold, or contracted to be sold, in the absence of fraud and false representation, a party purchases the tract agreed upon, and in the absence of a guarantee as to quantity is entitled to no abatement if there is a shortage, nor is the vendor entitled to an addition to the price if there is an excess."

In that case it is further said: "In that case, as in this, the sale was of a solid body of land, and not by the acre. The description was, 'containing 500 acres, more or less.' It turned out on survey that there were only 262 acres, but the Court allowed the purchaser no abatement because he could have protected himself by examination or survey, or he could have required a covenant as to the number of acres, citing *Walsh v. Hall*, 66 N. C., 233; *Etheridge v. Vernoy*, 70 N. C., 713, and cases

there cited. *Smathers v. Gilmer, supra*, has been cited with approval in *Stern v. Benbow*, 151 N. C., 462. It would be otherwise if there was a covenant as to the acreage, or if the purchase was by the acre, and not for a definite tract of land, as to which sources of information were open to both parties." The above cases are cited and approved in *Higdon v. Howell*, 167 N. C., 457.

In *Turner v. Vann*, 171 N. C., 129, all the above cases are cited and approved by *Allen, J.* In that case the plaintiffs alleged that they purchased the land, relying on representations of defendant that the tract of land containing 550 acres, which was false, and that the tract only contained 379 acres. The Court denied the abatement of the price.

The fifth assignment of error is that the court erred in refusing to instruct the jury that "If they believed the evidence, to find that the plaintiff falsely and fraudulently deceived the defendant as to the acreage and the boundaries of the land described in the complaint, known as the Turner Wall tract. This is admitted by plaintiff by reason of its failure to reply to the defendant's answer." But there is no evidence, as set out in the record, to justify such instruction, and the answer, while it alleged that the representation that the tract contained "about 97 acres, or something in excess thereof," was false and fraudulent, does not allege that there was any intent to defraud and deceive (*Tarault v. Seip*, 158 N. C., 368; *May v. Loomis*, 140 N. C., 352); nor are the facts constituting fraud set out, as is necessary (*Mottu v. Davis*, 151 N. C., 237; *Beaman v. Ward*, 132 N. C., 68); nor that any advantage was taken of the defendant by any fraud.

The answer did not raise the issue of fraud by sufficient pleading, and the court properly refused to permit the defendant to testify as to representations made by the plaintiff in regard to the number of acres. The defendant stated to the court that "He expected to prove by this witness that the plaintiff, as the agent of his father, represented to the defendant that the tract of land contained at least 97 acres; that it was bought by the acre; that the defendant was buying the entire Turner Wall tract; that these representations were made prior to, at the time of, and subsequent to, the signing of the contract alleged in the complaint."

This would not have tended to prove fraud and deceit to set aside the contract, but merely to contradict the written agreement. Fraud is not sufficiently pleaded in the answer (*Mottu v. Davis* and *Tarault v. Seip, supra*), nor is mutual mistake, but simply a representation by the agent of the seller, that the tract contained 97 acres, and that the sale was by the acre, whereas the written agreement shows that it was sold by the tract and at a lump sum. The statement alleged, if the answer had been permitted, would have shown merely an expression of opinion by

the agent of the seller as to the quantity of acres and could not have contradicted the terms of the contract. There were no pleadings and no evidence that required the submission of the issues tendered by the defendant.

The court properly instructed the jury that if they believed the evidence to answer the issues as found. The contract was in writing, and there was no pleading nor evidence to set it aside for fraud or mistake.

No error.

F. T. GATES v. J. G. McCORMICK ET AL.

(Filed 11 December, 1918.)

1. Evidence—Maps—Lands—Title.

A map of the lands in dispute may not be received in evidence against an adverse claimant, though made by the county surveyor, when there is no evidence that the one in his chain of title, for whom it was expressed upon its face to have been made had it in his possession, or that it was made at his instance, or that he had received it as authoritative or correct; the statement thereon, standing alone, being inadmissible as hearsay.

2. Same—Ancient Documents.

A map or document may not be received in evidence solely because it has the appearance of being old and faded, for it must have been in the possession of one in the chain of title of the adverse claimant and in recognition of its correctness, or it must be produced from a proper or natural custody, under circumstances that will tend to free it from suspicion or fraud or invalidity. *Nicholson v. Lumber Co.*, 156 N. C., 59, cited and applied.

WALKER, J., dissents.

ACTION, tried before *Harding, J.*, at June Term, 1918, of SCOTLAND, upon this issue:

Is plaintiff the owner of the lands described in complaint, or any part thereof; if so, what part? Answer: "No."

From the judgment rendered plaintiff appealed.

G. B. Patterson, Russell & Weatherspoon, and U. L. Spence for plaintiff.

Cox & Dunn, C. W. Tillett, McLean, Varser & McLean for defendants.

BROWN, J. Plaintiff claimed title under the McMillan grants and introduced evidence tending to locate said grants on the land in contro-

versy and connected himself with the grantee by mesne conveyances. The claim of title by adverse possession under color seems not to have been supported and to have been abandoned, as there is no reference to it in plaintiff's brief. The defendants claimed title under two senior grants to John Gilchrist, one for 500 acres and the other for 448 acres. The controversy appears to have been as to the beginning corner of the 500-acre grant. It seems to have been admitted that if the beginning corner of the 500-acre Gilchrist grant is located at the point J on the map, that defendant's grants cover the *locus in quo*. This grant begins "at a stake in the head of the north prong of Hills Creek, two pine pointers." The plaintiff contended that the head of the north prong of the creek was at A. This would locate the Gilchrist grants off the *locus in quo*. The entire controversy seems to be largely a question of fact in locating the beginning of the 500-acre Gilchrist grant, and the jury appear to have adopted defendant's contention.

Exhibit B, offered in evidence by plaintiff and excluded, is important. This purports on its face to be a survey of the land and reads as follows:

"Surveyed for John Gilchrist on 3 September, 1851, 640 acres of land in Richmond County on the west side of Drowning Creek and east of the Juniper, beginning at the third corner of his 500-acre tract, and runs with its third line west 51 chains and 25 links to its fourth corner; thence with its fourth line south 18 chains to a stake two pine pointers in said line, then west 40 chains to a stake two pine pointers; thence north 60 west 43 chains to a small pine on the west side of the Juniper about 20 chains below the main head; thence north 40 chains to a stake, two pine pointers; thence east 129 chains and 25 links to a pine on the south of Little Muddy Creek; thence south 43 chains to the beginning. Entered 21 April, 1846. No. warrant, 2280.

JAMES GILCHRIST. THOMAS GIBSON, *Surveyor.*
DANIEL W. JOHNSON.

It is stated in the record that the paper appeared to be faded and very old and in handwriting of Thomas Gibson.

It appears that this map was found among the papers of W. H. McLaurin, deceased, under whom defendants do not claim. In fact, he appears to have had some interest adverse to them.

We are of the opinion that the map, or survey, was properly excluded. The map and certificate would have been competent against defendants if it had been shown that the map was made at the instance of John Gilchrist and was accepted and adopted by him while he owned the land; but as none of these facts were shown, the map was properly rejected.

The rule is that a map is evidence against a party and those claiming

under such party, provided it can be shown that the map was made at the instance of such party and was accepted by him while he was claimant of the land.

This ruling is fully supported by *Webb v. Hall,* 18 N. C., 278, where the map offered in evidence was admitted upon the ground that it was made at the instance of Beazley, who was then the owner of the land. *Chief Justice Ruffin* says: "The map would be evidence against him of the extent of his estate or claim, not upon the ground that it was the work of the county surveyor or the plan subsequently drawn by the original surveyor, upon whose certificates the grant issued, but because it was Beazley's own act. The plat of 1822, we think, was properly rejected because there was no evidence at whose instance it was made, nor from whose custody the paper came."

There is no evidence that the map in question was made at the request of John Gilchrist. The mere recital of Gibson in the paper that it was made for John Gilchrist cannot be accepted as evidence any more than any other hearsay testimony. The fact that a map is made by a county surveyor is not sufficient to permit it to be introduced in evidence, but it must be shown to have been made at the instance of the party for whom it was made, so as to become his act as well as that of the surveyor. There is no evidence that the Gibson map or survey was ever in the possession of John Gilchrist or that he ever accepted or recognized it.

The ruling of the Court in *White v. Hall* seems to be supported by the subsequent cases of *Burnett v. Thompson,* 35 N. C., 379; *Perkins v. Brinkley,* 133 N. C., 350; *Hall v. Eaton,* 139 Mass., 217; *Plummer v. Baskerville,* 36 N. C., 252.

Nor do we think that Exhibit B could be admitted without proof as an ancient document. It has not been proven to have been found among the papers of John Gilchrist or in any other proper or natural custody. *Nicholson v. Lumber Co.,* 156 N. C., 59.

In this case, *Justice Hoke* clearly states the rule governing the admission of such documents: "It is well established that ancient documents—that is, documents relevant to the inquiry and bearing date or purporting to bear date at or before a period of thirty years prior to the time the same is offered in evidence—prove themselves—that is, they are admissible in evidence without ordinary requirements as to proof of execution or as to handwriting—the recognized limitations being that they should be produced from proper or a natural custody and be free from suspicious circumstances indicative of fraud or invalidity."

There are a number of assignments of error in the record, all of which we have considered and think they are without merit and need not be discussed.

Upon a review of the entire record, we find

No error.

WALKER, J., dissents as to survey and plat of Thomas Gibson, deceased, former county surveyor (Exhibit B), being of opinion that it is competent as a declaration of a deceased person, who was disinterested, as to boundary, the circumstances of its being found in the papers of W. H. McLaurin not affecting its competency, but only its weight as evidence.

G. B. WOODY v. CAROLINA SPRUCE COMPANY.

(Filed 11 December, 1918.)

1. **Master and Servant — Employer and Employee — Physician — Unskillful Services—Negligence—Consideration—Damages.**

An employer who furnishes medical treatment, when required, to his employees, upon an assessment plan to meet the expenses thereof, is required to exercise due care in the selection of the physician and in continuing him in its service, and, upon its failure to do so, is responsible in damages to an employee caused by his incompetency.

2. **Same—Evidence.**

Where the employer is liable in damages for the unskillful treatment of an incompetent physician it had engaged for its employee, testimony of other physicians that an operation by him was unskillfully performed on an employee entitled to such services, and that the patient thereby suffered injury, tends to prove the incompetency of the physician employed.

3. **Same—Knowledge—Notice—Inquiry—Assurance.**

Where there is evidence that an employee of defendant had complained to the defendant that a physician the latter had engaged to attend to its employees when in need of medical care was incompetent, and thereafter sues to recover damages for unskillful medical treatment at his hands, under assurance by the employer, at the time, of the competency of the physician: *Held*, evidence sufficient to show that the defendant knew, or was put upon reasonable inquiry, of the incompetency of the physician, and that the employee relied upon the assurance of his employer in submitting to the operation, which he had the right to do.

ACTION, tried before *Justice, J.*, at August Term, 1918, of YANCEY. From judgment of nonsuit plaintiff appealed.

Hudgins, Watson & Watson for plaintiff.
Pless & Winborne and J. Bis Ray for defendant.

BROWN, J. This case was before us at a former term, and is reported 175 N. C., 545. The facts are fully stated in the opinion of *Mr. Justice Walker* granting a new trial for error in the admission of evidence.

The plaintiff was in the employment of defendant as mill foreman. On 15 April, 1916, while discharging his duties around the mill plaintiff broke both bones of his right arm between the elbow and wrist.

Plaintiff and defendant had entered into an agreement whereby plaintiff was to pay out of his wages one dollar per month to defendant, and in consideration of this defendant agreed to furnish a competent physician to treat plaintiff in case of sickness or injury. This regulation of defendant applied to all its employees.

Plaintiff further avers that defendant failed to employ a physician of competent skill, and that the physician employed, one D. J. Smith, was unskillful and incompetent, and that defendant had knowledge of his incompetency.

Plaintiff avers that when his arm was broken it was set by Dr. Smith and Dr. C. S. Aldridge, president of the defendant company, who was not a practicing physician, although at one time he was reported to have practiced; that the operation was performed with such gross unskillfulness that the plaintiff was seriously and permanently injured.

Plaintiff further alleges that he insisted at the time upon sending for a competent physician, but the president of defendant company assured plaintiff that Dr. Smith could do it as well as any one.

It is contended in the brief of the learned counsel for defendant that the nonsuit should be sustained upon two grounds: "The first being that there was not sufficient evidence to go to the jury that the doctor was an unskilled and incompetent surgeon, or if he was, the defendant knew of it or might reasonably have known of it; and, second, that if the doctor was unskilled, the plaintiff knew of this fact, and notwithstanding his full knowledge, as shown by his cross-examination, he accepted his service and is not permitted to complaint of the defendant."

There is abundant evidence, and we do not understand it to be denied, that Dr. Smith was employed by defendant to treat its employees, and that they were assessed to pay the expenses. The defendant was under no legal obligation to employ a physician to treat its employees, but when it assumed to do so and to deduct a monthly sum from their wages for medical attention, it was under obligation to exercise due care in selecting the physician and in continuing him in its service. *Guy v. Fuel Co.*, 48 L. R. A., 536, cited and approved in the former opinion in this case.

Viewing the evidence in its most favorable light for plaintiff, as we must do in cases of nonsuit, we are of opinion that the learned judge erred, and that he should have submitted issues to the jury with appropriate instructions.

The evidence of Drs. Biggs and Gibbs tends to prove that the operation was very unskillfully performed, and that the plaintiff suffered in

jury thereby. This of itself tends to prove incompetency upon the part of those who performed the operation. There is also evidence that defendant had knowledge of or facts sufficient to put it on inquiry of Dr. Smith's incompetence, and that notwithstanding it continued him in its service.

There is evidence that plaintiff some time before he was injured complained to the president of the company of Dr. Smith's incompetence, and when he was injured the president assured him that he and Smith were fully competent to perform the operation, and that defendant, in submitting to the operation, relied upon such assurance, as he had a right to do.

We will not further discuss the evidence as it might prejudice the defendant on another trial.

Error.

J. C. MITCHELL v. SOUTHERN RAILWAY COMPANY.

(Filed 11 December, 1918.)

1. Railroads—Master and Servant—Employer and Employee—Disobedience to Orders—Freight Train.

Where an employee of a railroad company has left his home in the service of the company, under an agreement that he is to be returned thereto by one of its trains, and there is evidence that a passenger train was to have stopped for him upon being flagged, but, with the knowledge and approval of the defendant's vice-principal, he took a freight train for that purpose, it is evidence sufficient to take the case to the jury upon the question of whether he was rightfully upon the freight train and not in disobedience of orders, and to hold the company liable in an action to recover damages for an injury proximately caused him by the negligent acts of the defendant's employees in running the train whereon he was riding.

2. Same—Negligence—Instructions—Relative Duties.

Where there is evidence tending to show that the plaintiff, an employee of the defendant's railroad company, was riding in a caboose on the defendant's freight train, in the course of his employment, with the consent and approbation of the defendant's vice-principal, and the injury complained of was caused by the defendant's employees on the train running it without sufficient headlight, contrary to the statute, and without observing other customary precautions, a charge of the court that the defendant was required to use ordinary care for the plaintiff's safety, and that he should use such relative care for his own safety as this method of travel required, etc., is not to the defendant's prejudice or one of which it may reasonably complain. *Wallace v. R. R.*, 98 N. C., 494; *Marable v. R. R.*, 142 N. C., 557; *Usury v. Watkins*, 152 N. C., 760, cited and applied.

MITCHELL *v.* R. R.

ACTION, tried before *Cline, J.*, and a jury, at March Term, 1918, of WILKES.

Plaintiff resided at Wilkesboro, and was employed by defendant from July to and including 4 December, 1916, as extra force foreman, in repairing the damage done to defendant's roadbed from North Wilkesboro to Winston-Salem, made necessary by the July flood of 1916, and was provided with a force of men and a work train for the purpose of moving plaintiff and his men from place to place and to such points as the plaintiff was directed to go by the men in charge over him, viz., C. W. Anderson, supervisor, E. L. Bird, assistant supervisor, and Mr. Martin, another assistant supervisor. While plaintiff was riding on said work train from Abolee (a side track 7 miles east of Elkin), between 5 and 6 o'clock on 4 December, 1916, for the purpose of transferring to the passenger train at Elkin, as he had been directed so to do by assistant supervisor Byrd, it collided with the rear end of defendant's westbound freight train at Elkin, severely and permanently injuring plaintiff, and he brings this action to recover damages for such injuries, which he alleges were caused by defendant's negligence.

The defendant, in its answer, admits "That immediately after the July flood of 1916, the plaintiff was employed by the defendant in the capacity of extra force foreman, and was provided with a force of men and a work train to move plaintiff and his men from place to place, to such points as the plaintiff was directed by the men in charge over him, to wit, C. W. Anderson, supervisor, E. L. Byrd, assistant supervisor, and a Mr. Martin, assistant supervisor," but defendant denies liability for the injuries to the plaintiff for that on the particular day of the injury, as it alleges, arrangements had been made for the passenger train to stop at Abolee and take plaintiff to his home at Wilkesboro, but plaintiff, for his own convenience, had, prior to the coming of the passenger train, taken passage on the work train to Elkin, there to board the passenger train for North Wilkesboro, and denied that plaintiff had been directed by assistant supervisor Byrd to board the work train and go on it to Elkin, and there catch the passenger train for his home at Wilkesboro. Defendant also denied it had been negligent; but if it had, plaintiff knew that the afternoon passenger train was to stop at Abolee for him, and he assumed the risk of the caboose being run in front of the engine so as to obstruct the view of the engineer.

The plaintiff testified: "I went down there (to Abolee) and went on the train to Rockford; put my men on at Abolee, and there I saw Mr. Byrd and asked him if anything had occurred, and he said he had heard nothing yet; there might be something by the first of the year. I said if he approved of my work, would he give me a recommendation, and he said he would be glad to, and I have it with my things. The work

train came up and I came with Mr. Byrd to Abolee. I went out and took all the men to work and turned them over to Mr. Will Byrd, and told Mr. E. L. Byrd that Mr. Crews said he would stop for me at Abolee, but I would have to flag him down. He said, 'I will tell Mr. Love for you to go on the work train, and you need not flag him. You can go from Elkin home, and I will ask him to take you there.' Mr. Love told me that Mr. Byrd told him to carry me to Elkin. Mr. Love was conductor on the work train. I got some of the men who were working for me from Mount Airy, Wilkesboro, and Brushy Mountain. Some of them went to Abolee with me and I turned them over to Mr. Byrd. After Mr. Byrd told me to get on the work train, he said I could go on the Shoo-fly home. That was the train on which Mr. Crews was conductor. When he told me to get on the work train he said to put my things on the train and take them. We put them on and brought them to Elkin, and Mr. Sparger, the engineer, and Mr. L. A. Allen, flagman or brakeman, helped me, and Mr. McDowell packed them in the car. We left Abolee Monday evening some time after six. I was in the caboose in the end next to the engine, the caboose being in front of the engine. I had seen the freight train before that evening going west towards Elkin. Don't remember whether it was on time. When it passed Abolee they had a box car on the rear of the train hitched to the caboose. The caboose is used for conductor and flagman and those to ride in, and it is supposed to be attached to the rear end of the train, but there was a car which had a drawhead pulled out the rear end, so that car was coupled behind the caboose. The west end of the car was fastened to the caboose, the drawhead, or coupling, was off the east end, and so there was no way to hitch to that end, and I saw no way for it to display a signal. On a caboose there is an arrangement to display signals; you can hang your lantern on the rear end. They generally have a red light on the rear of freight trains after night. When we left Abolee the caboose was in front of the engine, being pushed towards Elkin, no other car in front of the caboose. In the caboose with me were Mr. Sparger, Mr. Allen, and Mr. McDowell. It was very dark when we got to Elkin. Before we got there, flagman Allen and brakeman McDowell were in the cupola of the caboose, which is a little place fixed above the caboose to have an outlook forward towards the engine. While they were there there was no light displayed in front of the caboose in which we were riding, nor any signal, and the caboose being in front of the engine obstructed the headlight of the engine, so that it could throw the light only against the caboose. My recollection is that Mr. Allen and Mr. McDowell came out of the cupola and walked out of the door about half a minute before the crash came, and it was very near the trestle, not more than one hundred feet below the woolen mills.

The train was running about ten or twenty miles an hour; that is my best thought of it. There was no light displayed on the rear of the freight train; I was looking out of the door and there was no light at all. Our work train was being operated on the main track and the freight train was standing on the main track at Elkin. I never saw any flagman there to flag our train down. At the time our train ran into the freight train I was in the front end of the caboose; Mr. Allen and Mr. McDowell were on the platform; they stepped about six or eight feet ahead of me. They ran into the box car, and it smashed all up, and I went down in the scramble and somebody picked me up and they toted me out and laid me on some of the cross-ties. It was dark when they carried me out and I could not see how many cars were torn up. Before the crash I was in the caboose; after the crash I was in the lumber where the caboose was mashed, under wreckage. I was hurt; don't know what all was on me. The wreck mashed me practically all to pieces—through my body, through my side and back, hip, legs, hands all mashed, places cut in my face, and right ankle and a bone broken or cracked, which swelled up as big as two legs. My legs were bruished and mashed and had cut places, thighs mashed and blood-shotten. No bruises left now. Since the injury my physical condition has been bad, not able to do anything, suffered all kinds of pain. Suffered awfully that night; couldn't sleep; suffered severe pains eight or ten days; suffer yet. I didn't think that I could live."

The jury returned a verdict for the plaintiff, finding that defendant was negligent; that the plaintiff was directed by E. L. Byrd, defendant's supervisor, to go to Elkin on the work train, and there board the passenger train for Wilkesboro, and assessed the damages.

Judgment upon the verdict and appeal by the defendant.

Hayes & Jones for plaintiff.
Manly, Hendren & Womble for defendant.

WALKER, J., after stating the case: It appeared in this case, after the second section of the complaint and the answer thereto, that defendant admitted the authority of E. L. Byrd over the movements of the work train, and that the person in charge of it was subject to his direction and control. This is the purpose of the admission and, it being true, we do not see why the plaintiff was not entitled to have the jury say whether he was rightfully on the train when it collided with the freight train and injured him. In addition to this admission, it appears that the plaintiff, as extra force foreman of that section of the railroad, was, by consent of E. L. Byrd, who, it appears, had the supreme control, permitted him to go to Wilkesboro on the Saturday before the col-

lision and come back with his men on Monday, with the promise that he should be returned by train to his home at Wilkesboro, where he was accustomed to go, on Monday evening, he having been superseded in his position as foreman by another man, the brother of E. L. Byrd.

Counsel for defendant, in the argument, did not contest his right to be thus returned to his home, but relied upon what he claims was a direction to plaintiff that he should go by the passenger train, which he had arranged to take at Abolee, by flagging the conductor of that train, so that he would stop at the station and take him on. But all these were but questions of fact to be settled by the jury, and they have found against the defendant.

We are not disposed to hold that the plaintiff, when riding to Elkin on the work train for the purpose of taking the passenger train there for Wilkesboro, was not then in the service or employ of the defendant. He was in its service when he left Wilkesboro on Monday, because he had been engaged by E. L. Byrd, the supervisor, on the Saturday before to come back to Abolee on that day, with the promise that he could return on one of the defendant's trains to Wilkesboro.

The plaintiff testified: "I thought my job had terminated that day—was out that day. I was taking my things home when I got hurt, and when I got home I thought I was through with the company." By this he meant, of course, that the company had induced him to return to Abolee Monday with a promise to give him passage in its train to his home in the evening, and that he was still in the employ of the company until he had finished his journey and reached his home. The defendant, in its brief, says, "Under the circumstances, we think undoubtedly the defendant owed the plaintiff the duty to take him back to North Wilkesboro."

We concur in this opinion, and add that it was so contemplated by the parties when plaintiff was ordered back to Abolee on Saturday, and so expressly agreed, according to his testimony.

It appears that the plaintiff was received on the work train by Mr. Love, who had charge of it when it started, and that none of the other employees, including Mr. Allen, who claimed to be the conductor, objected to his being on the train. There is also evidence that it was customary for him to ride on that train. The conductor of the passenger train, while willing to carry the plaintiff to Wilkesboro and to stop at Abolee on receiving a signal for him, stated that he preferred not to stop for that purpose. Under these circumstances, it was not illegal for him to board the work train with Mr. Byrd's permission. The latter seemed to have full authority to act for the company, being in charge at that place, and his general authority over the work train was not

or at least it cannot be questioned. Everybody appeared to be subordinate to him and subject to his orders.

In the case of *McNeill v. R. R. Co.*, 135 N. C., 699, the Court said, quoting from *Waterbury v. R. R. Co.*, 17 Fed., 671: "The right which a passenger by railway has to be carried does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him." And again: "A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption in any aspect of it that the plaintiff was entitled to be carried as a passenger, as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or as a matter of favor, as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed," citing *R. R. Co. v. Derby,* 14 How., 468; *Steamboat Co. v. King,* 16 How., 469.

There are other authorities cited in *McNeill v. R. R. Co., supra,* which are applicable to this case, and we refer to them generally and without doing so by their names.

It is said in 4 Ruling Case Law, at sec. 589: "A common carrier providing sufficient means for the accommodation of its passenger traffic is under no obligation to receive and transport persons on other than its regular passenger vehicles, yet if it does so, it assumes toward them the same duties and must exercise the same care, so far as the means of transportation permit, which would be due them if they were traveling on a conveyance regularly intended for passengers, and the passenger assumes only such risks as are necessarily incident to the character of the conveyance and the purpose for which it is being operated. This rule has been frequently applied in the case of persons transported on freight or mixed trains, special trains, construction trains, and logging railroads." And at sec. 593, it is said: "There are also decisions making a distinction in the degree of care required towards regular passengers and as to persons being transported on the vehicle of a carrier, who

while not regular passengers are yet not trespassers, as, for instance, in the case of one permitted to ride without payment of fare upon a conveyance not devoted to the carriage of passengers, and holding that as to such persons the carrier is required to use only ordinary care, and is not liable for slight negligence."

This accords somewhat with what is held in *McNeill's case, supra;* but we need not endorse or approve this principle, or even discuss it, for in this case it is apparent that there was not only gross negligence in the operation of the train, but even a degree of recklessness which may have amounted to wantonness, as defined in 8 Words and Phrases, at p. 7386. These are some of the meanings of that word, as stated by the courts: "Wantonness is a course of action, or of conduct, taken without regard to the rights of others." *Everett v. Receivers,* 121 N. C., 519; *S. v. Brigman,* 94 N. C., 888, 889; *Welch v. Durand,* 36 Conn., 182, 184. "It is conduct willful or unrestrained action, or running immoderately into excess." *Cobb v. Bennett,* 75 Pa., 326, 330; *K. P. Ry. Co. v. Whipple,* 39 Kans., 531. It is that degree of recklessness, with a conscious knowledge of its probable harmful consequence, which, in law, finds its equivalent in willful or intentional wrong. *B. S. Ry. Co. v. Powell,* 136 Ala., 232. It is the conscious and intentional failure by one charged with a duty to exercise due care and diligence to prevent injury after the discovery of peril, or under circumstances where he is charged with the knowledge of such peril and being conscious of the inevitable or probable results of such a failure. *Birmingham R. & E. Co. v. Pinckard,* 124 Ala., 372. It is a reckless disregard of the rights of others where serious damages may ensue. *W. U. Tel. Co. v. Lawson,* 66 Kan., 660.

We need not go to the length of holding, in order to dispose of this case, that the conductor of the defendant's employees in charge of this train and those in charge of the freight train was wanton. There was a gross inattention to duty, such as would in all probability result in very serious injury to the persons on the train, including the plaintiff.

The case in some of its salient features is not unlike *B. S. Railroad Co. v. Powell,* 136 Ala., 232; *St. Joseph, etc., R. Co. v. Wheeler,* 35 Kan., 185; *Kansas City R. Co. v. Berry,* 53 Kan., 112. The train was running in violation of a statute and in a reckless manner, and, without the aid of the statute, the conduct of those in charge of the train was not only negligent, but grossly so. The rule as to the degree of care to be exercised towards a person in a freight or construction train was stated in *Wallace v. R. R. Co.,* 98 N. C., 494; *Marable v. R. R. Co.,* 142 N. C., 557; *Usury v. Watkins,* 152 N. C., 760.

The Court in *Wallace v. R. R. Co., supra,* at p. 498, said: "A 'caboose'

attached to a freight train does not furnish all the appliances and conveniences for the safety and comfort of passengers that are provided for passenger trains, and while it is the duty of the company carrying passengers on such a train to exercise every reasonable care and take every precaution against injury or danger to the life of such passengers which the appliances for that mode of transportation will admit of, it is also the duty of the passenger who travels on such a train with a full knowledge of the increased risk incidental thereto to be correspondingly careful in guarding against injury by reason of the risk incidental to such mode of travel. An act may be negligent or not, according to the attendant circumstances."

The above cases sustain the judge's charge as to the degree of care, and it was not at all unfavorable to the defendant. The two trains were practically without any lights or other safeguards, and this fact is what caused the collision with its fatal result.

This case is not like *Vassor v. R. R. Co.*, 142 N. C., 68, or *Peterson v. R. R. Co.*, 143 N. C., 260, for here it was part of the contract made on the Saturday before that the plaintiff should be returned to his home at Wilkesboro by the defendant's train, which formed a contractual relation between him and the company, and it was the officer who, with the requisite authority, made the contract with plaintiff for the company, who directed him to ride in the caboose and told the conductor to receive him on his train. The learned judge, therefore, was not in error when he required of the defendant the exercise of ordinary care toward the plaintiff in the operation of the train. The latter was surely entitled to such a degree of care and diligence.

After a thorough review of the case, we find no error that was committed in the court below.

No error.

DAVID FRANKLIN ARNDT v. JEFFERSON STANDARD LIFE INSURANCE COMPANY.

(Filed 11 December, 1918.)

1. Evidence—Letters—Authenticity.

Where letters received by mail are sought to be introduced upon the trial as evidence against the opposing party to the action, the signature of the writer or other requisite proof of its authenticity must also be offered.

2. Principal and Agent—Evidence—Declarations—Letters.

A letter may not be received as evidence of the writer's agency to act for another, for statements therein of this character are mere declarations

by the supposed agent, the truth of which has not been supported by the oath of the witness and cross-examination.

3. Evidence—Letters—Authenticity.

Before a witness may testify to the genuineness of a letter offered in evidence, he must qualify himself by evidence tending to show that he is in some way familiar with the writing and the signature.

4. Principal and Agent—Evidence—Declarations—Hearsay.

Declaration of a third and disinterested person, having no authority to speak for the principal, are incompetent to prove agency.

5. Principal and Agent — Fraud — Evidence — Insurance—Payment of Premium.

In an action to recover the premiums paid on a life insurance policy, upon the ground of fraudulent representations by the defendant's agent in its procurement, it is competent, upon cross-examination of the plaintiff, to show that he had received a letter from the defendant stating the correct conditions under which it had been issued, together with the fact that he had thereafter paid the annual premium on the policy.

6. Principal and Agent—Fraud—Insurance Policy—Payment—Laches—Limitation of Actions.

Where the insured claims that he had been induced by the fraudulent misrepresentation of the insurer's agent, as to the paid-up value of the policy, to accept it, and he, though able to read and write, and with full and free opportunity to inform himself of the true facts, plainly expressed upon the face of the policy, kept the insurance in force for nine years: *Held*, he is barred by his own laches and the three-year statute of limitations, after the discovery of the alleged fraud, from avoiding the policy and recovering the premiums thereon.

7. Insurance—Fraud—Policy—Contract—Waiver.

Where the insured, being able to read and write, after having kept his policy of life insurance in force for a number of years, seeks to avoid it and recover the premiums he has paid thereon, on the ground of fraudulent representations by the defendant's agent as to its paid-up value, and it appears that he had paid another premium thereon after he had been correctly informed as to the facts, which were clearly expressed in the face of the policy itself: *Held*, he was put to his election before the payment of the last premium, either to invalidate the policy upon establishing fraud, or to recognize the contract as written, and his voluntarily paying this premium after knowledge was a waiver of this right, and barred his action based on the ground of the alleged fraud.

8. Contracts—Tort—Election—Waiver—Actions.

Upon the discovery of fraud in the procurement of a written contract, the plaintiff must elect, within a reasonable time, depending upon the existing circumstances, either to sue upon the tort and recover his damages for any deceit, or claim under the terms of the contract; and where he has elected to sue for damages for breach of contract, and not in repudiation thereof or for its reformation, he thereby waives his right of action to invalidate it by reason of the tort.

ACTION, tried before *Cline, J.*, and a jury, at July Term, 1918, of CATAWBA.

The action was brought by the plaintiff to recover damages of the defendant on account of an alleged fraud of the agents of the Greensboro Life Insurance Company. Plaintiff alleged that in December, 1906, the agents of the Greensboro Life Insurance Company induced him to apply for a policy of life insurance for $1,000 by making the following false representations:

(1) That after carrying a policy for two years, if he should become dissatisfied with it, he would have the option to make surrender of same and receive from the company all moneys he had paid to it under said contract, without interest (the interest being offset by the temporary protection to plaintiff under the policy).

(2) That after paying in premiums as much as $700 he would not be required to pay any other or further sum on account of said contract, but that it would become a paid-up policy.

A policy was subsequently issued by the Greensboro Life Insurance Company on the plaintiff's life, bearing date 1 March, 1907; but whether the policy was delivered through the mail or by an agent of the Greensboro Life Insurance Company does not appear. The plaintiff at the time he applied for the policy was 53 years of age, and could read and write. He paid nine annual premiums upon the policy, his last premium being paid in March, 1915. This action was commenced in June, 1917. Plaintiff testified that "a good long time before he started suit" he found out that the policy was not what he thought it was, and he wrote to the company in March, 1914, and inquired how many more premiums he would have to make before he had a paid-up policy, and the company replied under date of 10 March, 1914, advising him that his policy was "a whole-life contract," and that he would have to pay premium as long as he lived. In the following year, after having received this information, he paid another premium.

The defendant has assumed the liabilities of the Greensboro Life Insurance Company.

The court nonsuited the plaintiff, and he appealed.

W. A. Self for plaintiff.

Brooks, Sapp & Kelly and W. C. Feimster for defendant.

WALKER, J., after stating the case: *First.* This assignment of error is based upon the refusal of the court to admit in evidence the letter of another person to the company, which purported to have been sent by D. W. Cochrane to the plaintiff, and is untenable for two reasons: First, it was not identified. Plaintiff did not attempt to prove the

signature of D. W. Cochrane, by whom the letter purports to have been written, but merely offered the letter in evidence without any proof of its genuineness. Letters are not admissible until satisfactory proof has first been made of their authenticity. Lockhart on Evidence, sec. 96. In the case of *Beard v. R. R.*, 143 N. C., 136, this Court said: "While it is well settled that where it is shown that a letter was addressed, stamped and mailed, there is a presumption that it was received by the addressee, it cannot be that the receipt of a letter purporting to be signed by a person is any evidence that it was written by such person. No authorities are cited to sustain the exception." See, also, *Woody v. Spruce Co.*, 175 N. C., 545; *Tyson v. Joyner*, 139 N. C., 69, and cases cited therein. In the second place, even if the authorship of the letter had been properly proven, it was not competent as evidence in this case, and, besides, was offered by the plaintiff for the purpose of proving that D. W. Cochrane was general agent of Greensboro Life Insurance Company, and, therefore, was merely an offer to prove agency by the alleged declarations of the agent himself. That such declarations are not admissible to prove agency is well settled. *Daniel v. R. R.*, 136 N. C., 517.

Second. This exception is sufficiently answered by what we have said under the first assignment of error. The plaintiff had not qualified himself to swear to the signature of Mr. Cochrane. In fact, he testified that he had never seen him but once in his life, and that was on the occasion of his applying for the policy. He had never seen him write and had never even seen a signature admitted to be his, so far as the evidence discloses. He was simply not qualified to testify to the genuineness of the signature.

Third. This objection is addressed to the refusal of the court to allow the plaintiff to testify as to Mr. Ervin's declaration with respect to Mr. Cochrane's relations to the Greensboro Life Insurance Company. It would seem to be too clear for argument that it is not permissible to prove agency in this way. It was hearsay, or the unsworn declaration of a third party, not qualified to bind the defendant. 1 Greenleaf Ev., sec. 99.

Fourth. Defendant was allowed to ask plaintiff, on cross-examination, if he did not receive a letter from defendant under date of 10 March, 1914, advising him that his policy was a whole-life contract, and that he would have to pay premiums as long as he lived, and plaintiff excepted to the admission of this testimony. It was clearly competent and material for the purpose of showing that plaintiff paid a premium after he acquired this information and waited for more than three years thereafter before instituting this action. The letter was read to the court and jury, and then the witness, who was the plaintiff, was asked

if he received the letter, which he admitted, and if it did not notify him of the true nature of his policy, which he also admitted, and then stated that after being thus informed as to the contents of the policy he paid a premium a year afterwards. We can see no possible objection to this evidence. It was merely repeating what was in the letter.

The real question in the case is whether upon the admitted facts the defendant is liable to the plaintiff in damages to the amount of premiums paid by the latter, with interest thereon.

The contract of insurance is plainly worded, and there is no difficulty in ascertaining its meaning by reading it. It is a printed policy, there being no handwriting on it except the signatures of the officers, and they are easily read. The plaintiff testified that he could read print and sign his name, and yet he kept the policy in his possession for about nine years without even looking at it himself or asking any one to do so for him. He stated that his apprehension was not aroused until he was told by a friend, Dr. Bandy, who held two similar policies, that they did not read as represented by the plaintiff to him, so as, in effect, to become paid-up policies when $700 in premiums had been paid upon each of them. Without reading his policy, as far as appears, he wrote to the company, inquiring as to "how many more payments he would have to make until his policy would be paid up," to which the company replied at once that his policy was a "whole-life" one, and that he would have to pay premiums as long as he lived. This, he says, did not correspond with the representation of D. W. Cochrane, the agent, which was made to him at the time he was solicited to take the insurance, and which induced him to enter into the contract.

We are of the opinion that plaintiff was guilty of negligence in not reading his policy. While the agent, according to plaintiff's testimony, which must be taken as true, misrepresented the contents of the policy as to when it would be paid up, there was no fraud, trick, or artifice resorted to at the time the policy was delivered in order to prevent the plaintiff from reading it, and he kept it for nine years without doing so. *Floars v. Ins. Co.*, 144 N. C., 232, citing *Upton v. Tribleeock*, 91 U. S., 45; *Bostwick v. Ins. Co.*, 116 Wis., 392. See, also, *Clements v. Ins. Co.*, 155 N. C., 57; *Wilson v. Ins. Co., ibid.*, 173.

In the *Clements case*, the Court, quoting from *Floars v. Ins. Co., supra*, said: "There is also strong authority for the position that on the facts of this case the relief sought would not be open to plaintiff even if there had been a mutual mistake in the preliminary bargain and by persons with full power to contract, for the reason that plaintiff accepted the policy with the alleged stipulation omitted without having read same, and held it without a protest for three months," citing *Upton v. Tribleeock, supra.* But however this may be, the plaintiff,

after he had been fully and explicitly informed as to the true contents of his policy, and that it contained no such provision as the one he stated that the agent had represented to him was in it, kept his policy for some time without reading it and without making any complaint to the company, and actually paid the next maturing premium about a year after he had received the information from the company itself. This was a waiver of any fraud practiced upon him nearly ten years before, if there was such. His paying this premium voluntarily to the company after obtaining full information as to the contents of his policy amounted to a clear decision by him not to avail himself of the fraud. The act of paying the premium under the peculiar circumstances was inconsistent with any contention on his part to take advantage of the false representation of the agent at the time the contract of insurance was made.

It was held in *Jones v. Ins. Co.*, 153 N. C., 388, where an allegation of fraud similar to the charge against the agent in this case, that if, notwithstanding the fraud, the policyholder afterwards, with knowledge of the facts, paid premiums it would be a waiver of the fraud unless the payment of the premium was itself induced by fraud, of which in that case there was no evidence, nor is there any in this case. But *Cathcart v. Ins. Co.*, 144 N. C., 623, would seem to be decisive of this case, the facts being similar to those in this record. The *Chief Justice*, delivering the opinion, said: "The defendant asked the court to charge the jury: 'The plaintiff admits that at the time he received the policy he could have read it; that nothing was done by any agent of the company to keep him from reading it; that he put the policy away, and several years thereafter he heard general talk among the people that the company would not live up to statements made by the agents, and that he then took his policy and read it, or read such part of it as he saw proper, and the court instructs the jury that, this being the evidence of the plaintiff himself, you will, on the whole evidence, answer the sixteenth issue Yes.' This issue was as to whether plaintiff had waived the right to rely upon the alleged false representations, if made, and it was error to refuse the prayer, for the plaintiff testified that after reading the policy he continued to pay the premiums. This was an acquiescence in the terms and conditions of the policy. The *feme* plaintiff was even more explicit—that she read the policies again and again, and she and her husband thereafter continued to pay the premiums on all the policies which they had taken out for themselves and their children. The evidence is that the plaintiffs were intelligent people. This case is not like *Caldwell v. Ins. Co.*, 140 N. C., 100, for there the plaintiff was an illiterate old colored woman who could not read the policy, but relied on the statement of the agent. Furthermore, when she became alarmed,

the defendant's agent lulled her into security and induced her to continue to pay the premiums. There was nothing of that in this case." The case of *Gwaltney v. Ins. Co.* is then distinguished, and *Floars v. Ins. Co., supra,* cited with approval. *Cathcart v. Ins. Co., supra,* has since been approved in several cases, as will appear in Anno. Ed. of 144 N. C., at p. 625.

The payment of the premium after a fair opportunity to act deliberately in regard to the matter was an election by the plaintiff to continue the insurance upon the terms stated in the policy. There is no evidence here that the plaintiff at the time he received the policy was prevented from reading it by any trick or contrivance, and if he had read it he would have discovered very easily that there was no such term in the contract as the one he was led to believe was there. In this connection, what was held by the Court in *Bostwick v. Ins. Co., supra,* is pertinent: "If a person in a business transaction with another is deceived by the latter to his injury, such person may rescind the transaction within a reasonable time after he discovers or has reasonable opportunity to discover the fraud, constructive knowledge thereof being just as effective as actual knowledge to set the time for rescission running and to mark its limits. If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound, as a matter of law, to examine the policy within a reasonable time after it comes to his hand and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same. The reasonable time for discovering that the policy differs from the one supposed to have been applied for in the circumstances stated in the foregoing rule commences to run immediately upon the reception of the paper, nothing occurring then to reasonably excuse the applicant for omitting to examine his contract. In such circumstances, four and one-half months delay in discovering the fraud and exercising the right of rescission is, as a matter of law, too long a time."

The time within which action should be taken to rescind the contract would to some extent depend upon the circumstances of the particular case. The *Bostwick case* also decided that "The existence of a cause of action at law to recover the consideration parted with upon a contract on the ground of fraud presupposes the actual termination of the contract because of the fraud, and that requires a repudiation of such con-

tract by the insured person *in toto,* or so far as justice may require, and an unconditional offer on his part, so far as justice may require, to restore the wrongdoer to his former situation."

In this case the plaintiff has repudiated the contract and elected to sue for the entire consideration paid by him—that is, the premiums, with interest. Plaintiff has substantially and in law waived the tort and sued for money had and received, which is the premiums paid by him to the company, with interest thereon. He could not be entitled to this specific amount if he had not elected to waive the tort or treated the contract as rescinded, because of the fraud, and recover the entire amount paid. The rule, in a case like this, is that where a party discovers that a fraud has been practiced upon him he must act promptly in his own protection, as laches may bar his right. 25 Cyc., 792; *Knight v. Houghtalling,* 85 N. C., 17; *Howland v. C. L. Ins. Co.,* 121 Mass., 499, 500; *Ins. Co. v. Miller,* 32 N. W., 550.

It is said in the *Howland case:* "If it be assumed that the plaintiff had the right, at his election, to treat the act of the defendant's agent as a rescission of the contract, justice requires that he should give notice of this election within a reasonable time. An election made eleven months after, during which time the liability of the defendant had continued, was not within a reasonable time."

In the *Houghtalling case Justice Ruffin,* for the Court, said: "The rule of law is that he who would rescind a contract to which he has become a party must offer to do so promptly on discovering the facts that will justify a rescission, and while he is able, of himself or with the aid of the court, to place the opposite party substantially *in statu quo;* he must not only act promptly upon the first discovery of the fraud, if fraud be the cause assigned for the rescission asked, but he must act decidedly, so that his vendor may certainly know his purpose, and thereby have the opportunity afforded him to assent to the rescission, resume the property, and look out for another purchaser. In no case is he permitted to rescind when he has continued to treat with his vendor upon the basis of the contract after his discovery of the fraud practiced upon him, and neither is it allowed him to rescind in part and to affirm in part; but if done at all, it must be done *in toto.* This rule is founded on the plainest principles of justice, and has been universally recognized, and virtually so by this Court in the cases of *McDowell v. Sims,* 41 N. C., 278; *Tomlinson v. Savage, ib.,* 430, and *Alexander v. Utley,* 42 N. C., 242."

The plaintiff, while not a man of much education, seems to be of fair intelligence, good judgment and practical sense. He understood very well what his rights were. When he discovered what he alleged to be the fraud of the agent he should have acted with reasonable promptness

and notified the defendant that he elected to repudiate it, or to reform it, or to affirm it, and recover his damages for any deceit, but this he did not do, but, on the contrary, he waited for nearly a year, when he paid the premium with full and accurate knowledge of all the facts necessary for him to act upon, and, finally, he did not bring this action until more than three years after he acquired, according to his own admission, full knowledge of the facts, which were disclosed to him by the defendant in the letter. He is, therefore, barred both in equity by laches and at law by the statute of limitations.

Justice Hoke said in *Modlin v. R. R. Co.*, 145 N. C., 227: "The statute applicable (Revisal, sec. 395, subsec. 9) provides that actions of the present kind are barred in three years after the discovery by the aggrieved party of the facts constituting the fraud, and, construing this subsection, the Court has decided that the statute commenced to run when the aggrieved party first discovered the facts, or could have discovered them by the exercise of proper effort and reasonable care."

If he waived the fraud, he cannot sue for damages, as the contract stands, and he is bound by it. So, in no view apparent to us can he recover.

Affirmed.

MRS. LAURA A. PATRICK v. JEFFERSON STANDARD LIFE INSURANCE COMPANY AND COUNTY OF GUILFORD.

(Filed 11 December, 1918.)

1. Deeds and Conveyances—Alleys—Appurtenances—Adjoining Lands—Adverse Possession—Evidence—Questions for Jury.

The owner of land within the limits of a city conveyed a part thereof to P and G., along which was an alley, and afterwards another part to the county for a courthouse square, leaving the alleyway to connect with part of the land he had then retained, with provision in the deed to P. and G. leaving one-half, or 4 feet, of this alley adjoining the P. and G. land "in the seizure of" the grantor, with covenant that it should be continuously left open as a passway for himself and the said P. and G., and which should not be obstructed "by him or any other person:" Thereafter, the county acquired all of these lands, and among other things done on the alley, it enclosed the alley with a fence, planted trees, grass, rose bushes, etc., thereon, and the county and its grantee, the defendant in the action, held the alley as part of the courthouse square for a period of fifty years: *Held*, sufficient evidence of adverse possession to ripen the defendant's title in the alleyway; and, further, the intent of the covenant in the deed, under which the plaintiff claims with respect to the alleyway, was to reserve it for the benefit of P. and G. and of himself and his heirs, and passed under the *habendum* as an appurtenance to the adjoining land since acquired by the defendant's grantor.

2. Limitation of Actions — Adverse Possession — Evidence — Questions for Jury—Trials.

The use and occupation of land, as from its nature and character it is capable of, dealt with so as to indicate an assertion of ownership, in opposition to the world, or its true owner, openly and notoriously, under a claim of right, and known and visible boundaries, or color of title deming its boundaries, is sufficient evidence of adverse possession, if continued in for the statutory periods applicable, to ripen the title in the person thus claiming it.

3. Deeds and Conveyances—Alleys—Appurtenances—Evidence—Extraneous Circumstances.

Observing the strict requirement that in construing conveyances of land the intention of the parties is first to be ascertained from the language employed in the written instruments, regarded as a whole, the courts may regard the surrounding circumstances, in appropriate instances, in ascertaining their intent, and adopt the interpretation which conforms more to the presumed meaning; and where it clearly appears that a grantor of lands has covenanted that an alleyway be kept open for the convenience of his grantee, and of himself and his heirs, in regard to the adjoining lands, and also to afford an outlet to a part of his lands lying at the inner end of the alleyway, and that he has subsequently sold all the remainder of the land adjoining, the court may view the whole transaction and its attendant circumstances to ascertain the intent of the grantor as to the alley; and where the purchaser from him, and those claiming in succession to him, have acquired the whole of the original tract and used it adversely and notoriously, under a claim of right, for more than twenty years, without objection from any one, it is sufficient to vest the title in the defendant, the last purchaser.

4. Deeds and Conveyances—Alleys—Title—Merger.

Where an alleyway has been reserved in a deed to lands as appurtenant to their use, and the grantee has acquired the remainder of the lands, in fee, the easement, a subordinate and inferior derivative right, is merged in the fee-simple title.

5. Appeal and Error—Verdict—Judgments—Issue—Answers.

Where the verdict of the jury has been adverse to the appellant upon two issues, either one of which is determinative of the controversy, the judgment accordingly rendered upon one of them alone will not be disturbed on appeal.

ACTION, tried before *Adams, J.*, and a jury, at March Term, 1918, of GUILFORD.

The suit was brought to quiet the title to a certain parcel of land in the city of Greensboro west of and adjoining the courthouse lot, or square, being 4 feet wide and extending from West Market (formerly Main) Street 87 feet and 10 inches north from said street, it being the western half of an alley which lay between the courthouse square (sold by Solomon Hopkins to the county) and the brick building known as

the Patrick or Porter & Gorrell storehouse, the other, or eastern, half of the alley being part of the said courthouse lot, "the middle line of the alley being identical with the western line of the original courthouse lot. Plaintiff claims that 4-foot strip, or western half, of this 8-foot alley as devisee under the will of her husband, Thomas J. Patrick, who acquired title to the front portion of the lot, next width of this alley, from Dr. I. J. M. Lindsay, and conveyed it to Porter & Gorrell, who conveyed it to the county, as far back as 1872 or 1873.

The deed from Patrick to Porter & Gorrell, dated 13 July, 1862, contained this provision, leaving the western half of the alley, or the 4-foot strip along the eastern side of the storehouse, "in the seizure of said T. J. Patrick," which he covenanted, for himself and his heirs and assigns, should continually be left open as a passway for himself and the said Porter & Gorrell, and should never be obstructed by him or them or any other person. The lot in the rear, or north of the one just described, was also owned by Patrick, and this he conveyed to W. A. Caldwell, who, in his turn, conveyed it to the county of Guilford. This lot also fronted on the 8-foot alley, and in the deed of Caldwell to the county the easement in the alley is mentioned. The county also purchased from Ralph Gorrell the lot north of and adjoining the last named, or Caldwell lot. The county also purchased lots from Hinton and Staples north of and adjoining the Gorrell lot and the courthouse square, on which the courthouse stood. The county by its several purchases many years ago, between 1870 and 1875, acquired title to all of the land, except West Market Street, which surrounded the parcel of land, or 4-foot strip, now in controversy.

The county of Guilford was made a party defendant, upon its own request, in order to protect its covenants of title in the deed to its co-defendant, the Jefferson Standard Life Insurance Company, and any other interest it has in the cause.

The court charged the jury fully upon all the questions raised in the case, as far as it was necessary to do so, and especially upon the evidence as to the adverse possession of the defendants and its effect upon the issues. The jury returned the following verdict:

1. Does the defendant, the Jefferson Standard Life Insurance Company, claim to be the owner in fee simple of the land described in the complaint and in controversy under and by virtue of the deeds executed to it and the mesne conveyance for said property? Answer: "Yes."

2. Have the defendant and those under whom it claims been in the open, notorious, adverse and continuous possession of the land described in the complaint and in controversy for a period of twenty years before the commencement of this action up to known and visible metes and bounds? Answer: "Yes."

3. Is the plaintiff the owner in fee of the land described in the complaint and in controversy? Answer: "No."

Judgment was entered upon the verdict for defendants, and plaintiff appealed.

Alfred S. Wylie and R. C. Strudwick for plaintiff.
John S. Wilson and Brooks, Sapp & Kelly for defendants.

WALKER, J., after stating the case: The plaintiff claims that by reason of the words of reservation in the deed of her husband, T. J. Patrick, to Porter & Gorrell, and the will of her husband, which devises all his real estate to her, she is now the owner of the 4-foot strip of land before described, while defendants claim that no such reservation was intended by Thomas J. Patrick, his only object being to afford him and Porter & Gorrell an outlet to West Market Street, and that when there was no longer any necessity for this use of the alleyway it passed by clear intendment of Patrick to the county at the time it acquired the surrounding land, and, besides, that if the plaintiff or her husband had any legal right to the strip it has been lost by adverse possession or adverse user for more than twenty years. It also contends that as the lot conveyed to Porter & Gorrell by Patrick was next to the alley, one-half of which the latter owned at the time of the conveyance, the eastern boundary of the grantees extended to the middle of the alley, under the description in the deed, which would take in the 4-foot strip of land now in dispute, subject to the easement or right of way over it of Porter & Gorrell, and Patrick himself, who were the holders of the dominant tenements. And it is further contended by defendants that, considering the deeds in evidence and the undisputed facts, Patrick never intended to reserve the legal title to the 4-foot strip, but merely to create an appurtenant easement in favor of the adjoining tenements, and that if he intended to retain the title it was only to remain in him so long as was necessary to protect the easement, and when this necessity ceased the strip should become a part of the lots sold and which bordered upon it, each receiving its pro rata share, or the part of the alley in front of it. But in this connection they do not admit that the 4-foot strip was ever intended to be severed from the Porter & Gorrell lot, but that the effect of the deeds was to reserve to T. J. Patrick such a control over the 4-foot strip as would enable him to create and preserve an easement, or right of way over it, for the benefit and more convenient enjoyment of the Porter & Gorrell lot and his own lot in the rear, or north of it, which he afterwards sold to W. A. Caldwell, who still later conveyed it to the county.

The judge, by consent, was given the right to answer the third issue after the verdict upon the other issues was returned by the jury, and when the verdict was announced he caused the following entry to be made: "Apart from the answer to the second issue, I am of opinion that when the county of Guilford acquired title to the lots there was a merger of the easements, and if an easement was revived when the county conveyed to the Jefferson Standard Life Insurance Company, it was revived only for the benefit of the owners of the fee, neither of whom seek to take advantage of it. There are other reasons that need not to be stated. I answer the third issue 'No.'"

We are of the opinion, after examining the record with care, that there was evidence fit to be submitted to the jury upon the question of adverse possession within the established rule as to what will constitute such a possession. The evidence tends to show that the space between the courthouse and Barker & Sockwell's store has been a part of the courthouse square since between 1872 and 1875, when the county bought the property for the purpose of having a square upon which to build the new courthouse, and that this space was ploughed up and sown in grass, and that trees were planted there, and a wire fence built across the space at different times to keep intruders out. Rose bushes were set out and the property was considered as belonging to the county, and so used.

The witnesses W. H. Green, W. G. Balsley, and W. H. Ragan testified that since the year 1874 or 1875 the open space west of the course, which includes the disputed strip of land, has been a part of the courthouse square, and so used by the county and the public, and W. H. Ragan further testified: "From the time I have known this property, either officially or unofficially, there has never been an alleyway or walkway leading from Market Street, running parallel with the courthouse going north and south next to the building, until the cement walkway was put down. Think the cement walkway was put down in 1900. It runs from the west side of the courthouse over to the walk running the other way along by Barker & Sockwell's place. Then there is another cement walk. Neither one of these walks run immediately along the courthouse running north and south. One runs from the courthouse west and the other straight across, going next to Barker & Sockwell's building. They meet in front of the office building. At no time when I was a member of the board, or its chairman, did the plaintiff in this case or testator, Mr. T. J. Patrick, ever make any claim to any portion of the property, or ask to pass over it."

The witness, W. H. Ragan, was for many years a member of the board of commissioners of the county and its chairman for seven years.

The plaintiff's witness, David Scott, testified: "The fence extended entirely up and covered the space to the courthouse building. It went

within a few feet of Barker & Sockwell's store. It included Patrick's drug store. I don't know just how close it went to Patrick & Sockwell's store. It included all the open space. After the fence went down this property was plowed up and sown in grass several times. After the first fence rotted down there were small posts put up and wire stretched across that in the same territory where the original fence was. This prevented any passage from West Market Street into the open property west of the courthouse except by persons who would get over the fence and go in."

There was much other testimony showing that the county was claiming to be the owner of this property as a part of the courthouse square, and that it was occupied and treated as such without any claim of title or ownership by the plaintiff until about the time that this suit was commenced.

Where there is such use and occupation of land as from its nature and character it is capable of, and it is dealt with in such a way as to indicate that the occupier is asserting the right of ownership over it in opposition to the world or to the true owner, and this is done openly and notoriously under a claim of right and under known and visible boundaries or color of title defining its boundaries, it is such adverse possession as, if continued for the statutory period —seven years under color and twenty years without color—will ripen the title to land if the State has parted with or lost its right and title to the same. It does, in the law, mean that the person must have his feet on every square foot of ground before it can be said that he is in possession. It may be established by inclosure, by the erection of buildings or other improvements, by cultivation, or, in fact, by any use of it that clearly indicates the appropriation and actual occupancy of a person claiming to hold it. The following cases support this view and state with fullness the nature of adverse possession as understood in this jurisdiction: *Christman v. Hilliard,* 167 N. C., 4, at p. 7; *Bryan v. Spivey,* 109 N. C., 57; *Boomer v. Gibbs,* 114 N. C., 76; *Vanderbilt v. Johnson,* 141 N. C., 370; *Simmons v. Box Co.,* 153 N. C., 257; *Ray v. Anders,* 164 N. C., 311; *Dobbins v. Dobbins,* 141 N. C., 210; *Berry v. McPherson,* 153 N. C., 4; *Locklear v. Savage,* 159 N. C., 236; *Coxe v. Carpenter,* 157 N. C., 557.

It was held in *Berry v. McPherson, supra,* that "While the evidence of title by adverse possession must tend to prove the continuity of possession for the statutory period in plain terms or by 'necessary implication,' it is sufficient to go to the jury if it was as decided and notorious as the nature of the land would permit."

The possession here was, as decided, notorious and continuous as the nature of the land would permit, and offered unequivocal indication that the defendant and those under whom it claims were exercising the

dominion of owners, and were not pillaging as trespassers by occasionally going upon the land for special purposes, and not in the assertion of a general ownership, but were using the same and making continual claim thereto. The defendant and those under whom it claims were exposed to suits, either at law or in equity, though the plaintiff mistakenly supposed they were not. *Boomer v. Gibbs*, 114 N. C., 76; *Osborne v. Johnson*, 65 N. C., 22; *Christman v. Hilliard, supra.* See, also, on the question of adverse possession, *Reynolds v. Palmer*, 167 N. C., 454; *Williams v. Buchanan*, 23 N. C., 537, and other cases cited in 167 N. C., at 455.

The inference from this record is that the plaintiff has never claimed ownership by paying the taxes on the property. It is a circumstance, if it existed, to be considered by the jury, though not a decisive one. *Christman v. Hilliard, supra*, and other cases cited on the point. For the law in other jurisdictions, see 1 Cyc., 984, 985, 987, 998, 999, and notes to the text.

But there is another ground upon which the plaintiff must fail. It is manifest from the entire case and a proper construction of the respective deeds that Mr. Patrick never intended to sever the strip from the lots he conveyed and to retain title to it as separate and distinct from the other land. His clear intention was to retain control over the strip for the purpose only of protecting the right of way over it for the use and benefit of the Porter & Gorrell lot and the one he owned adjoining and to the north of it. We have the right, when interpreting a transaction like this one, in order to ascertain its nature and purpose, to take into consideration the object and motive of the parties, or what they intended to accomplish, as shown by the several deeds for the property in dispute, and to survey the situation as a whole.

Mr. Patrick owned a lot back of the one he sold to Porter & Gorrell, and he desired an exit from it to West Market Street. It was necessary for the better and more convenient enjoyment of his tenement, and the same is true as to the lot he sold to Porter & Gorrell. These lots bordered on the alley and adjoined that part of it which he reserved as the right of way. As he owned that half of the alley, the fee in it, if nothing was said to the contrary, would have passed with the lots conveyed by him to Porter & Gorrell and to W. A. Caldwell. The following cases state and illustrate the principle:

"A conveyance describing a lot in a deed as bounded by an alley which is laid off on a certain plat will pass title to the center of the alley if the grantor's title extended so far, and it is immaterial whether or not the alley is ever brought into public use." *Jacob v. Woodfolk*, 90 Ky., 426.

"A conveyance of land bounded along a certain lane which was laid out entirely on the grantor's land, but on a margin thereof, carries the fee in the whole road-bed, and especially where all the land bordering on the lane was conveyed." *Haberman v. Baker,* 128 N. Y., 253.

"Where an alleyway (owned by the grantor) was laid out on the extreme edge of a lot, a deed conveying it and referring to it in the general description by reciting its number was held to carry the bed of the alley, notwithstanding the alley was referred to in the particular description as the boundary of the lot. If the owner of the land conveyed in two parcels, describing them as the northern and southern halves by metes and bounds, and as bounded southerly and northerly, respectively, by an alley, and such metes and bounds would establish an alley between them, while the strict division into halves would make the center line of such alley the division line between the parcels, the deeds should be so construed as to vest in each grantee title to the center of the alley." *Albert v. Thomas,* 73 Md., 181; *F. P. Church v. Kelar,* 39 Mo. App., 441.

Of course, if the grantor does not own the bed of the alley, or the part of it on his side, the deed would not operate so as to pass any part of the fee in the alley, but would stop at its boundary. The clear intention here was to convey to the center of the alley with Patrick's one-half of the alley burdened with the right of way given by the deed. Mr. Patrick could derive no benefit from his half of the alley except by using it for the purpose of an exit from his lots and Porter & Gorrell's lot. When Patrick comes to make a deed to the third lot on which the northern end of this alleyway abutted he made no reference to reserving any alleyway, or rights or title therein, as this was the only property owned by him in the block. Hence after conveying it up to the line of the old county square, he, by the habendum clause in the deed, vests in the grantee whatever rights might attach to this lot by his ownership on account of the reservation of easements and rights of way in the Porter & Gorrell lots. The provision in the deed "to have and to hold, together with all appurtenances and privileges thereunto in any wise belonging and appertaining, unto him in fee simple," etc., disposed of the last and remaining interests which he had in any land or easements in said square.

A case strikingly similar to the one at bar, in which a lot was conveyed bounded by an alleyway, and a reservation of the alleyway was provided for, as in this case, is *Hennesy v. Murdock,* 137 N. Y., 317 (33 N. E. 330). The Court there says: "Where the owner of a square divides it into two lots with an alley through the center, and conveys a lot bounded on the alley, 'together with the right of way of the alley aforesaid, which is forever to be kept open for the benefit of the lot,

and conveys the lot on the opposite side of the alley and bounded thereon to another grantee, the grantees take the fee to the center of the alley."

The express uses for which Patrick retained certain rights in the alleyway are nothing more than easements appurtenant to the lots; hence when the lots were sold the appurtenant easements went with them and no estate was left in Patrick such as would enable him, after a long residence in Virginia, or his devises nearly thirty years after his death, to assert against the county, which had been in open and notorious possession of both the lots and the strip of land for nearly fifty years.

In Jones on Easements, sec. 28, the doctrine is stated as follows: "An appurtenant easement cannot be conveyed by the party entitled to it separate from the land to which it is appurtenant. It can be conveyed only by a conveyance of such land. It adheres in the land and cannot exist separate from it. It cannot be converted into an easement in gross."

We find cases similar to this one in the books, where a like construction was placed upon the deeds. "After a highway had been laid out and established pursuant to law, the owner of the land conveyed the same with the usual covenant of warranty and seisin, saving and excepting the said highway. It is held that the right of soil in the highway had vested in the grantee, subject to the right of passage to the public." *Tuck v. Smith,* 1 Conn., 103.

"There is no rule of the common law better settled and more universally adopted in this country than that which prescribes that a grant of land bounded in general by a creek or river not navigable carries the land to the grantee *usque ad filum aqua*—to the middle, or thread, of the stream." *Rowe v. Lumber Co.,* 128 N. C., 301, and 133 N. C., 433.

In *Smith v. Goldsboro,* 121 N. C., 350, in discussing a similar question, the Court says: "In other words, he opens streets to induce parties to purchase lots, which they could not have done had not the streets been opened. While he may have retained the fee of the streets, inasmuch as he did not convey it to any one, he could not have expected any personal benefit therefrom as he now is not even an abutting owner, as appears from the record. He was fortunate in being able to dispose of all his lots at prices presumably satisfactory to himself. This, which would otherwise have been impossible, he was able to do by opening the streets in controversy, and he should not now be heard to assert any ownership in said streets to the injury of the parties whom he thus induced to purchase."

The last case, decided by this Court, is very much in point. Mr. Patrick opened the alley, with the county, to render his lots salable by creating an easement appurtenant over the alley, for the purpose of accessibility to the street, without the intention, though, of ever claiming

any interest otherwise in the alley, and dedicating it solely to that purpose. When the dominant tenements were purchased by the county and made a part of the square surrounding the courthouse, the right of way was no longer needed, and was thereby extinguished, and the servient tenement, if we may so call it, or the strip of land which was used as a way to the street, was merged into and became a part of the square. When he reserved the "seizure" of the strip he simply meant that the fee should pass to his grantees subject to the right of way, and in order to preserve this easement intact to him and his assigns he should have control of the strip so long as necessary for that purpose. This is the interpretation given to similar conveyances in the cases we have before cited.

We would not impute to Mr. Patrick the motive in making the reservation, that he did so for the purpose of annoying and harrassing his neighbors by excepting from his conveyance the fee of a narrow strip of land which, without the easement, could be of no conceivable benefit to him, and holding it so that he could exact a high and unreasonable price for it from them. It would have no value to him after he had sold his lots, save for such an unworthy purpose, which should not be attributed except upon such convincing proof as to make the inference inevitable. He had a more benevolent end in view. It is strange, too, as an additional reason for our construction, that so long a time—nearly one-half century—should elapse before any claim is made to this property. The deeds from W. C. Porter and the one from W. A. Caldwell to the county of Guilford were executed in February, 1873, the Gorrell deed to the county in 1873, the deed of Patrick to Gorrell in 1871.

As illustrating, and we think strongly emphasizing, the purpose and intention of Patrick in making the reservations in the deeds above referred to, and also as showing the interest which he understood was reserved to him thereby, we may well refer to his own conduct. After conveying the third lot at the end of the alleyway in the block to Porter in 1871, there is no evidence that Patrick ever exercised any ownership or control over the strip in question, or sought to do so, and although he lived for twenty years thereafter he never sought to assert any claim to the strip in question or objected to the county's plowing it, planting the square in trees, and fencing it off, as a part of the square, from the street, and even after his death nearly thirty years elapsed before any one representing his estate conceived the idea of ownership in said strip of land. This recent claim was evidently founded upon a mistaken apprehension as to the nature and extent of Patrick's right in this 4-foot strip of land.

A very similar effort was made in the case of *Casserly v. Alameda Co.*, 153 Cal., 170, where an action was brought to quiet title of a fractional

interest in certain public squares which had been in the open and notorious possession of the city for more than twenty years. The Court took occasion to say that indisputably the claim of plaintiff was barred by the statute of limitations. The evidence in this case clearly shows that the defendant insurance company and the county, from which is acquired title, have been in the open and notorious adverse possession and control of this strip of land for nearly fifty years. There were ample facts to sustain the jury's verdict upon the second issue, which of itself disposes of plaintiff's right to recover in this action. The court's determination of the law upon the third issue, without regard to the jury's finding upon the second issue, was correct, and if either conclusion is right, the judgment below should stand.

The presiding judge alludes to a merger of the easements. A merger, technical or ideal, takes place when the owner of one of the estates, dominant or servient, acquires the other, because an owner of land cannot have an easement in his own estate in fee, for the plain and obvious reason that in having the *jus disponendi*—the full and unlimited right and power to make any and every possible use of the land—all subordinate and inferior derivative rights are necessarily merged and lost in the higher right. 14 Cyc., p. 1188; *Barringer v. Trust Co.*, 132 N. C., 409.

We are permitted to scan the entire field of inquiry and to consider the transaction as a whole and with reference to all its parts in order to ascertain the true meaning of the grantor. *Gudger v. White*, 141 N. C., 507; *Triplett v. Williams*, 149 N. C., 394; *Beacon v. Amos*, 161 N. C., 357; *Brown v. Brown*, 168 N. C., 4; *Mining Co. v. Lumber Co.*, 170 N. C., 273.

Courts are always desirous of giving effect to instruments according to the intention of the parties so far as the law will allow. It is so just and reasonable that it should be so, that it has long grown into a maxim that favorable constructions are put on deeds. *Kea v. Robinson*, 40 N. C., 373; *Rowland v. Rowland*, 93 N. C., 214.

Chief Justice Taylor expressed this idea when he said that the very purpose of the law would seem to be to ascertain with more particularity what it was apprehended might not have been otherwise sufficiently described. *Campbell v. McArthur*, 9 N. C., 38. It may be taken as settled that courts will, for the purpose of ascertaining the intention of the parties, endeavor to place themselves in the position of the parties at the time of the conveyance. *Cox v. McGowan*, 116 N. C., 131, 133, and *Justice Connor* in *Modlin v. R. R. Co.*, 145 N. C., 229. It all is bottomed upon the ancient maxim that contemporaneous exposition is the best and strongest in law. (*Contemporanea expositio est optima et fortissima in lege.*) Our best and surest guide, therefore, in construing

instruments is found in referring to the time when, and the circumstances under which, they were made. Broom's Legal Maxims (6 Am. Ed.), star page 654. It is not difficult, by reading the deeds and considering the attendant circumstances, to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret them as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instruments, but it is proper to seek for a rational purpose in the language and provisions of the deed and to construe them consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire transaction "after looking," as the phrase is, "at the four corners of it." If we adopt this course, which is strongly commended to us, we can easily see that Mr. Patrick had no idea of retaining any title to the land except for the purpose of the easement, and then so long only as it lasted.

There was no error in the trial, and the judgment must stand.

No error.

J. H. PLEMMONS ET AL. V. J. R. MURPHEY ET AL.

(Filed 11 December, 1918.)

1. Issues—Form—Sufficiency.

The form of issues submitted to the jury upon the trial of an action is immaterial, if they are germane to the subject of the controversy, permit each party to present his version of the facts and view of the law, and the case may thereunder be tried upon its merits.

2. Appeal and Error—Issues—Answers.

An exception based upon an issue answered in appellant's favor will not be sustained on appeal.

3. Instructions—Issues—Evidence—Restrictions.

Where a deed is attacked for want of mental capacity in the donor and undue influence exercised upon him, and there is relevant evidence that there had been an unequal division of his property among his children, the parties to the action, the declarations of one of the parties thereof should be restricted to his interest, and a charge of the court which confines the consideration of the jury to the declarant and directs them not to affect the others in like interest, is a proper one, the presumption being that the jury will properly regard the instruction.

4. Same—Requests—Rules of Court.

Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. Supreme Court Rule No. 27, 164 N. C., 438.

5. Evidence—Parent and Child—Unequal Distribution—Trials—Appeal and Error—Harmless Error.

Where the controversy is about the mental capacity of the donor to convey lands to certain of his children, and their undue influence over him, the admission of evidence as to an unequal distribution of his lands among his children, concerning which there was no serious controversy, is harmless, if erroneous.

6. Evidence — Opinion — Mental Capacity — Deceased Persons—Statutes—Transactions and Communications.

After giving his opinion as to the mental incapacity of the deceased donor to make a deed sought to be set aside, the witness may testify as to the circumstances upon which his opinion is based, including personal transactions and communications with him, and, when properly confined, evidence of this kind is not objectionable under our statute (Revisal, sec. 1631).

7. Evidence—Deeds and Conveyances—Mental Capacity—Undue Influence—Parent and Child—Fraud—Nonsuit—Questions for Jury.

While a son may make a fair appeal to his father's sense of gratitude for consideration and attention shown him in sickness, disease, or helpless old age, for a larger share of his property than that of the other of his children, whose conduct has been, perhaps, less deserving, he may not exercise an overpowering influence over the impaired or failing mind of his parent, caused by such conditions, to his own sordid advantage; and where there is sufficient evidence that an influence of this kind has been exerted by a son to procure a deed to his father's lands, it partakes of fraud in its nature, and will be set aside upon such evidence, and a finding to that effect.

8. Evidence—Motions—Nonsuit.

The evidence, upon a motion to nonsuit an action involving the mental incapacity of the grantor of lands to make a deed, and undue influence exerted over him, should be considered in the light most favorable to the plaintiff, and if it is sufficient to sustain the action, when so considered, the motion will be denied.

ACTION, tried before *McElroy, J.*, and a jury, at August Term, 1918, of BUNCOMBE.

The action was brought to set aside certain deeds made by Levi Plemmons to his children for the purpose of division among them, and it is alleged that they were obtained from him when he was not mentally capable of executing a deed, and also by unfair and undue influence exerted by those of the defendants, J. R. Murphy and his wife, Hattie

Murphy, who was the donor's daughter, and J. C. Plemmons, one of his sons. There is also an allegation that they had illegally converted his personal property, worth $4,000, and consisting of notes, bank certificates, cash, cattle, mules, farm products, and farm implements, and other of his assets.

The court submitted issues to the jury, and they found that the grantor, Levi Plemmons, had sufficient mental capacity to execute the deeds, but that they were obtained from him by the undue influence of the defendants.

The statement of the evidence is very voluminous, and it would be useless to set it forth even substantially, and we content ourselves with making only a brief recital of some of its prominent features, using in many instances the words employed by the witnesses:

"Levi Plemmons, to whom the witnesses refer as 'a fair man,' 'a good man,' and 'a just man,' was formerly sheriff of Buncombe County. He died intestate on 11 August, 1916. The deeds involved were executed in 1913, when he was 79 years old. On 6 May, 1916, he was found, upon an inquisition of lunacy, to be incompetent to manage his own affairs and business. He had cancer for several years and went to Atlanta and had it removed, and in doing so lost one eye, part of his nose and cheek, and practically the whole side of his face, which was then covered with a plate, and when it was removed 'one could see the eye socket and down his throat, making a pitiful looking sight. Then he became weak and run down, and during his latter days got weaker in mind and body.' The cancer reappeared a time or two after it was removed, and the flesh receded from the plate. Before the deeds were made his hearing became bad, it was hard to understand him or to be understood by him; his good eye became affected and his speech was difficult; he suffered with 'swimming of head'; his recollection and judgment were bad; he couldn't call the names of his children; didn't recognize his children or grandchildren and other relatives, or his old friends, and he was incapacitated to transact ordinary business. His wife died in February, 1913, and from that time his body and mind failed more rapidly than before, and he had delusions about a fire being out and burning up everything, and about having sold a stack of hay for which he wanted to collect the money. He cried and complained about being bothered, and became so mentally weak that he pulled at his clothes, scattered and lost his bank certificates, amounting to $1,750, one being found at a log before the division and the other in weeds, on the second day of the survey; he forgot persons and conversations within a few minutes; didn't know about his cattle, and his actions and conduct made such an impression on persons with whom he associated that they said, 'The old man is losing his mind'; that 'Mr. Plemmons's mind is bad'; that 'Sheriff Plem-

mons was losing his mind,' and the report became general that 'he was not competent to transact business.' In 1910 or 1911 the defendant, Canada Plemmons, and his brother Hilliary discussed the mental condition of the sheriff and the division of his property, and Canada stated 'that they had waited too long because of the condition of father.'"

There was evidence that the division was unequal and unfair to the plaintiffs; that some of them had received more than their share, and, as to one of the defendants, that he recognized it and was willing to rectify it. There was also evidence of the commanding influence of the three defendants over Mr. Plemmons, and, further, that they employed it freely in effecting an unfair division in their favor. It also appeared that, at their suggestion, there was an inquisition of lunacy held to determine that Sheriff Plemmons was of sound mind and capable of making the deeds, the only witnesses being those who were brought there to give favorable testimony on an *ex parte* examination, the idea being to prepare themselves against any attack made upon the unequal division. There was evidence that Sheriff Plemmons, as he was called, desired all along to make a fair and equal division of his estate among his children, and that he was prevented from doing so by the interference of the three defendants, who the circumstances and fair inference therefrom tended to show held him in their power and under their control. There was this evidence as to the weakness of his mind and the treatment he received from those of the defendants with whom he lived at his home:

Rev. J. D. Colley testified: "I was going to church and he was sitting on the porch, and my wife was with me, and she hadn't been to church in a good bit, and she said, 'Yonder is old sheriff,' and I said, 'We will go down and see him', and we went and spoke to him, and he was in a way of weeping, and he said to us, 'I don't know you,' something about that way, and I shook hands with him and he reached his hand and said, 'Look here,' and his hands were all bruised and one of them was bleeding, and of course it touched my sympathy. He was a man I always liked, and I said, 'How came that?' and he says, 'These trifling boys did it,' and then Mrs. Murphy flew into a passion and said, 'That is another lie,' and 'It will go all up and down this creek now,' and I stepped out. It made me a little mad. That was about the remark. He told me that he had nothing; he says, 'I have got no home and no money or anything.' He further said, 'They have got all I have got away from me.' That was about a year before he died. I can't say whether it was before the guardian was appointed."

There was much other evidence as to his feebleness in mind and body and his susceptibility to be influenced by those who yet retained the full vigor of life.

The court rendered judgment upon the verdict, and defendants appealed.

J. Hall Johnston and Mark W. Brown for plaintiffs.
R. M. Wells and J. E. Swain for defendants.

WALKER, J., after stating the case: There was objection to the issues, but we think they were proper and covered the entire scope of the inquiry, and were in no respect substantially different from those tendered by the defendants. It is not material in what form issues are submitted to the jury, provided they are germane to the subject of the controversy and each party has a fair opportunity to present his version of the facts and his view of the law, so that the case, as to all parties, can be tried on the merits. *Deaver v. Deaver,* 137 N. C., 246; *Warehouse v. Osment,* 132 N. C., 839; *In re Herring's Will,* 152 N. C., 258; *Rakestraw v. Pratt,* 160 N. C., 436, 437.

The jury here answered the first issue in the defendants' favor, and they cannot, therefore, rely in this Court upon exceptions taken by them at the trial which relate solely to that issue. *Lyon v. A. C. L. Ry. Co.,* 165 N. C., 143; *Hallman v. So. R. R. Co.,* 169 N. C., 127.

The declaration of Canada Plemmons was restricted to him, as, at the time they were admitted, the judge expressly cautioned the jury that "it could only be used as to him." What he said as to the inequality of the division could be competent only as to himself and his separate interest. The case, therefore, is not within the principle suggested in *Linebarger v. Linebarger,* 143 N. C., 229. See *McRainey v. Clark,* 4 N. C., 698; *Ragland v. Huntingdon,* 23 N. C., 561; *King v. Inhabitants of Hardwick,* 11 East., 589.

Such evidence as the declaration of one party upon a material matter which may prejudicially affect another party to the suit, who has a similar but separate interest therein, may generally be incompetent as to the latter, but here the judge carefully and explicitly cautioned the jury that the admission of Canada Plemmons' testimony could be used, if at all, only as against him, and it must be presumed that the jury so used it. We cannot assume, as the basis of an objection to be considered by this Court, that a jury have disobeyed the judge's instructions. If the defendants, other than Canada Plemmons, desired a more particular caution they should have asked for it, for example, that the admission be specially confined to the validity of the deed to Canada Plemmons. Rule of this Court, No. 27 (164 N. C., 438.) The jury could have found under the second issue, as it was framed, that Canada's deed was obtained by undue influence. Either party could have asked the court for such a special finding by the jury; but we do not think

that the ruling was harmful, if the evidence was incompetent, as there was really no serious dispute, or could not be, that there was an unequal division. That is apparent from the value placed upon the several tracts. All the plaintiffs' evidence surely tended to show an inequality, and the defendants' principal witnesses, O. L. Israel and J. H. Cole, testified to the same effect. O. L. Israel said, "I consider that he gave Canada and Mrs. Murphy more land than he gave to any of the other children." And J. H. Cole stated, "The piece of land given these orphan children was worth less than half of this piece of land given to Murphy." And further he testified as follows: "I heard Sheriff and Mrs. Plemmons discussing the division of the farm. Could not say date, but during her lifetime. They were around the fireside. They had some trouble about the division. He said she did not want to value the buildings at anything, as they were getting old, but he thought they were worth something. He said he meant for Mrs. Murphy to have the home place. There was no difference between him and Mrs. Plemmons as to that, but he wanted to value the buildings at something. He said his reason for giving her the home place was she was the baby child."

The defendant has argued that Mrs. Plemmons did exactly what he intended to do of his own free will, and the division, while unequal, was according to his sense of right and the exercise of a volition freed from any constraint, and there is evidence to support this view. So that we need not place our decision upon the technical competency of the evidence, as we think that in any view the ruling was without prejudice.

It is competent for a witness, after giving his opinion that the maker of a will or deed did not have mental capacity sufficient to execute it, to state the reasons for his opinion, even though they may involve personal transactions or communications with the deceased testator or grantor. This has been settled by numerous cases, the latest of which is *Bissett v. Bailey*, at this term (96 S. E., 648), and cases cited. See, also, *Rakestraw v. Pratt*, 160 N. C., 436; *In re Stock's Will*, 175 N. C., 224; *In re Chisman's Will*, 175 N. C., 420.

It was said in *Rakestraw v. Pratt, supra:* "Plaintiffs proposed to prove same or substantially similar facts by Mrs. Martin, another sister, and the evidence was excluded, the court being of opinion that the testimony was incompetent under section 1631, Revisal, excluding, in certain cases, testimony of interested persons as to a transaction with deceased persons. The proposed evidence was in support of the opinion just given by these witnesses as to the mental incapacity of the mother and is not regarded as a 'transaction' by our decisions construing the section referred to. In *McLeary v. Norment*, 84 N. C., 235, the Court said: 'Where a witness testifies to the want of mental capacity in a grantor to make a deed, and that his opinion was formed from conversations and

communications between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded. Section 343 of the Code does not apply to the facts of this case.' Section 343 of the Code of that time corresponds to section 1631 of present Revisal."

There was ample evidence to show incapacity and undue influence. We need do no more than refer to the statement of the evidence already set out by us, as it is not required by the necessities of the case to dwell upon the details of this harrowing story. *In re Will of Amelia Everett,* 153 N. C., 83; *Rakestraw v. Pratt,* 160 N. C., 436; *Causey v. R. R. Co.,* 166 N. C., 5; *In re Will of Albert Mueller,* 170 N. C., 28; *Brown v. Brown,* 171 N. C., 649. See, also, *In re Craven's Will,* 169 N. C., 561, where we held that undue influence is shown in procuring the execution of the instrument in question when there is such domination by the stronger over the weaker mind as to amount to the substitution of the will of the former for that of the latter, resulting in an unfair advantage over others entitled to the testator's favor, and who would naturally receive it but for the intervention of this designing and controlling influence. The doctrine, as applied to both wills and deeds, is substantially the same.

In the *Everett case, supra,* it was said: "General evidence of power over a testator, especially of weak mind or suffering from age and bodily infirmity, though not to such an extent as to destroy testamentary capacity, has been held in this country to be enough to raise a presumption that ought to be met and overcome before a will is allowed to be established. *Robinson v. Robinson,* 203 Pa. St., 403; *Miller v. Miller,* 187 Pa. St., 572; *Boyd v. Boyd,* 66 Pa., 283. In this last case, referring to the above rule, the Court says: 'Particularly ought this to be the rule when the party benefited stands in a confidential relation with the testator.' *Judge Redfield* says: 'Where the party to be benefited by the will has a controlling agency in procuring its execution, it is universally regarded as a very suspicious circumstance and one requiring the fullest explanation.' Wills, 515. This text has been adopted and approved generally by the courts of this country. 27 A. & E. Enc., 438; Gardner on Wills, 189. Prof. Wigmore says: 'Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied.' Section 2503 and cases cited in note. The Court of Appeals of Virginia declares: 'When a will executed by an old man differs from his previously expressed intentions and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of undue influence

which should be overcome by satisfactory testimony.' *Hartman v. Strickler*, 82 Va., 238; *Whitelaw v. Sims*, 90 Va., 588; 1 Jarman Wills, 71, 72. Undue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence."

Undue influence is generally classed under the head of fraud, and so treated by the approved text-writers and by the decisions of the courts. When such influence is exercised for a sordid purpose, of which there is some evidence in this case, it is palpably fraudulent. Look not upon your neighbor's goods with a covetous eye is not only a biblical injunction, but is as well a principle of the law which enters into the investigation of such questions as we have here, and has a potent influence sometimes in deciding them. This man who stood well in his county and among his neighbors for many years, and occupied a place of the highest honor, so that it may well be said that he was a leader among his people, had lost the natural vigor of mind and body by extreme old age and the terrible ravages of disease, which had eaten away one-half of his face, destroyed one eye, and greatly impaired his sense of hearing, and so deeply had it embedded itself in the tissues and bones and gradually destroyed them that one witness testified, "You could look down his throat." His face was horribly disfigured. Is it to be wondered at that his faculties were prostrated and his memory became so bad that he did not even know his own offspring, and that he grew to be childish and forgetful, and became an easy victim to the undue importunities and machinations of the selfish and artfully designing.

A father may have favorites among his children because some, more than others, have favored him in his old age when, by reason of his infirmities, he needed their watchful care and attention. They may properly, but not unduly, use moral persuasion to obtain what they think they may deserve, a larger share of his bounty than the others, who are not justly entitled to so much.

We said in the *Craven Will case* (169 N. C., at p. 570): "It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection or of the power of rewarding those who bestow it. These views were strongly approved and commended by the Court in *Mackall v. Mackall*, 135 U. S., 167 (34 L. Ed., at p. 84), where the conclusion was reached that, in a legal sense, undue influence must destroy free agency. 'It is well settled,' said *Justice Brewer*, 'that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of

his property, but those of the persons exercising the influence.' The Court then also used language closely applicable to the facts in our case: 'That the relations between this father and his several children during the score of years preceding his death naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounced. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and to give to him, rather than the others, his property. To defeat a conveyance under those circumstances something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature, must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained.' And more apt are the words of this Court in *Wessell v. Rathjohn*, 89 N. C., 382, as the relation there was that of father and daughter." But while the law does not forbid fair appeal to the parent's sense of gratitude in order to obtain a larger share of his bounty, it strongly condemns an undue, dishonest and fraudulent advantage which is taken of the weak and infirm to secure any favor from him in the distribution of his estate among his children. It is wrong in morals and is sternly forbidden by the law.

In this case the jury, under the fair and impartial charge of *Judge McElroy*, and upon evidence which clearly warranted the conclusion, have found that the defendants unitedly practiced such a fraud upon this old, feeble and wretched man, who, instead, should have received from them their tender devotion and care in his last days, which were filled with so much of sorrow, affliction and distress. All this aggravates the wrong that has been done, but the law does not penalize it, and only requires that it shall be righted and the property be restored for a fair division among those who were at least legally entitled to their father's consideration and bounty.

We have not stated the case against the defendants as strongly as the evidence permitted and justified, but sufficiently so to describe some of the leading facts which tended to show the fraud, and which are enough to sustain the verdict as against a motion to nonsuit. The plaintiffs are entitled to have the evidence presented in the best view for them to the exclusion of any that is favorable to the defendants, who did not favor the court and a jury with their own version of the facts as witnesses in their own behalf or offer any explanation of circumstances, which give rise to grave suspicions, not to say more.

We have confined ourselves to those exceptions which we deemed to be material and of sufficient importance for discussion. The others are without any merit.

A careful review and investigation of the case discloses no error in the trial.

No error.

M. E. PROFFITT v. STATE MUTUAL FIRE INSURANCE COMPANY.

(Filed 11 December, 1918.)

1. **Insurance, Fire—Contract—Title—Deeds and Conveyances—Registration.**

An unregistered deed to lands is good as between the parties, and meets the requirement of an insurance policy as to unconditional ownership of title, when executed and delivered before the issuance of the policy, with consideration paid and sufficient to pass the title, though registered thereafter.

2. **Appeal and Error—Insurance, Fire—Policy—Contracts—Evidence.**

The admission in evidence of letters informing an insurer of a loss by fire covered by its policy cannot be considered as prejudicial to it, in an action to recover the loss, when the subject-matter of the letters was not in dispute.

3. **Appeal and Error—Record—Evidence—Letters.**

Prejudicial matter to the appellant's rights must appear of record, on appeal, and exception to the admission of letters as evidence will not be considered when their subject-matter is not disclosed.

4. **Insurance, Fire— Policy— Contract— Proof of Loss— Waiver— Principal and Agent.**

The proof of loss required in a policy of fire insurance may be waived by the agent and attorney of the insurer having the adjustment thereof in charge for his principal, as where he informed the insured that nothing further was required of him when this proof had not been made.

5. **Insurance, Fire—Policy—Contracts—Denial of Liability—Waiver.**

Exception made to evidence on the examination of the witness-in-chief, and not given until his reëxamination, should be objected to at the time of its admission, for the exception to its admission to be passed upon on appeal.

6. **Insurance, Fire—Proof of Loss—Waiver.**

A motion to nonsuit, in an action to recover the loss, by fire, under an insurance policy, upon the ground that the required proof of loss had not been made by the insured, will be denied when there is evidence of a waiver thereof by the authorized agent of the insurer.

7. **Insurance, Fire—Policy—Contracts—Proof of Loss—Denial of Liability—Waiver.**

The denial of liability for loss under a policy of fire insurance by the president and treasurer of the insurer is a waiver of the stipulation of the policy requiring proof of loss.

8. Appeal and Error— Evidence— Motions— Nonsuit —Grounds Stated for Motion.

Where, upon a motion to nonsuit upon the evidence, the appellant states the ground for his motion in the trial court, he will be confined to the grounds so stated on appeal.

APPEAL by defendant from *Cline, J.*, at the June Special Term, 1918, of AVERY.

This is an action on a fire insurance policy, the property burned being a storehouse.

The defendant denied liability and set up the special defenses that the plaintiff was not the sole and unconditional owner of the property at the time the policy was issued, and that he failed to make proof of loss within sixty days after the fire, as required by the policy.

There was a verdict and judgment for the plaintiff, and the defendant appealed, assigning the following errors:

First Exception: To the ruling of the court admitting in evidence the paper-writing dated 1 March, 1916, purporting to be a deed from the Lees-McRae Institute to the plaintiff, M. E. Proffitt, for that the said paper-writing had not been acknowledged at the date of the fire nor at the date of the institution of the action, and was insufficient to pass any title.

Second Exception: To the ruling of the court in permitting the plaintiff to testify in regard to the contents of a letter claimed to have been written by plaintiff to defendant without requiring the production of said letter or without requiring plaintiff to show that notice had been served on defendant to produce same.

Third Exception: To the ruling of the court in admitting in evidence two letters purporting to have been from Mr. Nash and Mr. Lowe without properly identifying either of them.

Fourth Exception: To the ruling of the court in admitting in evidence a conversation purporting to have been between one Mr. Nash and the plaintiff in regard to the making proof of loss by fire of the property covered by the policy when the policy itself offered by the plaintiff provides how proof of loss shall be made, which is otherwise than the manner testified to by the plaintiff.

Fifth Exception: To the ruling of the court in refusing to sustain defendant's motion to nonsuit the plaintiff at the close of the evidence, for that, according to plaintiff's evidence, he had not complied with the provisions of the policy in regard to making proof of loss, and had brought this action in violation of the terms of the contract.

Lowe & Love and F. A. Linney for plaintiff.

J. W. Ragland, R. W. Wall, and M. W. Nash for defendant.

ALLEN, J. 1. The paper-writing referred to in the first assignment of error is a deed to the plaintiff for the lot on which the storehouse was situate. It bears date prior to the time the policy was issued, but was not registered until after the fire, and for this reason the defendant objected to its being offered in evidence. The objection was properly overruled as a deed is good between the parties, and, except as against purchasers and creditors, without registration. *Warren v. Williford*, 148 N. C., 479; *Brown v. Hutchinson*, 155 N. C., 207; *Jordan v. Ins. Co.*, 151 N. C., 342.

In the first of these cases the point was made that the defendant had no title until his deed was registered, and the Court said "this is a misconception of the registration act; the title vests as against the grantor and all others except creditors and purchasers for value from the delivery of the deed," and in the second the plaintiff was permitted to introduce a deed upon the question of the title to land which was registered after the commencement of the action, and in the last it was held that an unregistered bond for title on which only one dollar of the purchase money had been paid was sufficient to meet the requirement in an insurance policy of sole and unconditional ownership. The evidence in this case is uncontradicted that the plaintiff had paid the whole of the purchase money, and that the deed had been delivered to him prior to the issuing of the policy.

2. The contents of the letter referred to in the second exception related to a fact about which there was no dispute, and the evidence had no bearing upon the controversy. The witness simply stated that he had written the defendant company there had been a fire which burned the storehouse.

3. The two letters purporting to have been from Mr. Nash and Mr. Lowe do not appear in the record, and there is no statement of their contents, so that we have no means of determining their relevancy or of seeing that they in any way prejudiced the cause of the defendant.

4. The evidence of the conversation with Mr. Nash, who was the attorney and agent of the defendant, was competent for the purpose of showing a waiver of the proof of loss.

The witness stated that Mr. Nash went to see him and was investigating the fire, and that after answering a good many inquiries he asked if there was anything else for him to do and was told by Mr. Nash that there was not.

It also appears from the record that the objection was made to the question upon the examination of the witness in chief, and that there was no answer until the reëxamination of the witness, after an extended cross-examination, and no exception was noted to the answer.

5. The court could not nonsuit the plaintiff upon the ground that he

had not complied with the provision of the policy requiring him to make proof of loss because there is ample evidence of a waiver of this stipulation on the part of the defendant.

The president and treasurer of the company testified that the company denied liability as soon as it investigated the fire; the agent and attorney, Mr. Nash, told the plaintiff there was nothing else for him to do, and the defendant has answered, contending that there can be no recovery upon the policy.

"A distinct denial of liability and refusal to pay, on the ground that there is no contract or that there is no liability, is a waiver of the condition requiring proofs of loss. It is equivalent to a declaration that they will not pay, though the proofs be furnished; and to require the presentation of proofs in such a case when it can be of no importance to either party and the conduct of the party in whose favor the stipulation is made has rendered it practically superfluous is but an idle formality, the observance of which the law will not require." May on Insurance (4th Ed.), sec. 469; *Gerringer v. Ins. Co.*, 133 N. C., 407; *Higson v. Ins. Co.*, 152 N. C., 208; *Parker v. Ins. Co.*, 143 N. C., 339.

The defendant also insists in this Court, upon his motion for judgment of nonsuit upon the ground that it appears from the evidence that the plaintiff had filed a petition in bankruptcy, and that, therefore, the title to the property was in the trustee.

The evidence as to the bankruptcy is too obscure and indefinite to base a ruling on it, but if it was otherwise a party is not permitted to object to evidence or make a motion upon one ground in the Superior Court and urge another in this Court. When he points the objection or the motion, the ground stated becomes a part of the objection. *Bridgers v. Bridgers*, 69 N. C., 455; *Gidney v. Moore*, 86 N. C., 490; *Ludwick v. Penny*, 158 N. C., 104.

The judgment must be affirmed.

No error.

JOHN D. BRIDGER v. H. C. BRETT.

(Filed 18 September, 1918.)

Vendor and Purchaser—Injunction—Costs—Appeal and Error.

Where the purchaser of merchandise has stopped payment of his check at the bank after the seller has endorsed it, claiming that the latter could not make delivery, and the seller, having the check in his possession, has been restrained from using it, but deposits it in court with tender of delivering the merchandise: *Held*, the restraining order was proper to the time the check was deposited in court, and the costs properly taxed to that

time and not thereafter; and *Held*, further, the costs on appeal should be equally divided between the parties.

ACTION heard on return to preliminary restraining order, before *Kerr, J.*, at February Term, 1918, of HERTFORD.

The affidavits of plaintiff tended to show that he bargained to defendant 300 bags of peanuts, at the price of $2,514.87, the peanuts to be delivered on payment of defendant's check for that sum on the Bank of Winton; that, plaintiff and defendant going to the Bank of Winton with the check, plaintiff endorsed same with the purpose of procuring the money, and payment of same was refused. Thereupon defendant said he would not pursue the matter further, and the trade was then and there canceled; that plaintiff left the bank and inadvertently left the note, with plaintiff's endorsement thereon, in the cashier's window, and defendant took and now holds same; that defendant is insolvent and "is threatening to use said check or convert same to his own use."

Defendant answered, and, on oath, alleged that he had bargained with plaintiff for the 300 bags of peanuts and given his check for the amount stated, but stopped payment of the check in plaintiff's presence, on hearing plaintiff say his home had been broken into and a good many bags stolen, and he could not make delivery of all the peanuts sold.

Defendant, admitting that he held the check with plaintiff's endorsement thereon, denied that he was insolvent or that he had any intent to negotiate said check, and deposited same in court, subject to the orders in the cause.

Upon deposit being made, the court entered judgment as follows:

"This cause comes on for trial on motion and notice heretofore issued, and defendant having deposited the check in question in court, accompanied with the written tender filed in court, it is now, on motion of R. C. Bridger and Winston & Matthews, attorneys for the defendant, considered and adjudged that the restraining order and temporary injunction heretofore issued and sued on, and the same is hereby dissolved and vacated. It is further considered and adjudged that the clerk of this court will deliver the said check to J. D. Bridger upon proof that there has been a delivery of the 300 bags of peanuts in question. If there be no such delivery, then the clerk of this court shall hold said check in his custody, subject to the order of this court and until the final determination of this action. All costs incident to this motion are to await the final determination of this action and to be adjudged accordingly. This cause is continued."

From this judgment plaintiff appealed.

Winborne & Winborne and John E. Vann for plaintiffs.
No counsel for defendant.

PER CURIAM. Under the facts as presented in the pleadings and evidence, plaintiff was entitled to have the negotiation of this check restrained till the final determination of the cause (*Yount v. Setzer,* 155 N. C., 213; *Tise v. Whitaker,* 144 N. C., 508), and we think the costs of the proceedings, till the defendant voluntarily deposited the check in court, should be paid by defendant, and the order of his Honor will be so modified.

Inasmuch as the check in dispute is now on deposit with the clerk, and there is no longer any present need for a continuance of the injunction, the judgment of his Honor dissolving the same, and that the check be detained till the final determination of the cause, is affirmed.

The exceptions noted by plaintiff, that he may have the check on delivery of the peanuts, would seem to be in his favor and not open to serious objection from him.

The costs of appeal will be divided and taxed equally against plaintiff and defendant.

Modified and affirmed.

E. C. WHITE v. THE TOWN OF EDENTON.

(Filed 25 September, 1918.)

ACTION, tried before *Kerr, J.,* at December Term, 1917, of CHOWAN, upon these issues:

1. Is the plaintiff the owner and entitled to the possession of that portion of the land described in the complaint which is enclosed within the lines 9, 8, 10, 5, 4, 11, 12, 13, and 1 to 9, on the map, or any part thereof; and if so, what part? Answer: "Yes; the whole of it."

2. Has the defendant unlawfully trespassed upon the same, as alleged? Answer: "Yes."

3. What damage, if any, is plaintiff entitled to recover of defendant? Answer: "$10."

Defendant appealed.

C. E. Thompson and J. S. Manning for plaintiff.

S. Brown Shepherd and J. N. Pruden for defendant.

PER CURIAM. This case has been tried three times and is reported 171 N. C., 21; 173 N. C., 32.

We have examined the exceptions in the record and can find no substantial error that necessitates another trial. Three juries have an-

swered the same issues in favor of the plaintiff, and we are not disposed to grant a new trial in such cases unless the error assigned is of a character that manifestly requires it.

No error.

W. D. LAMM ET ALS. v. SARAH HOLLOMAN ET ALS.

(Filed 18 September, 1918.)

Appeal and Error—Issues—Answer to One—Complete Bar—Exceptions.

Where appellant, plaintiff, does not allege error as to an issue, the answer to which is a complete bar to his right of action, exceptions to other issues need not be considered on appeal.

APPEAL by plaintiffs from *Daniels, J.*, at March Term, 1918, of NASH.

This is an action to establish a resulting trust in a certain tract of land.

The jury returned the following verdict:

1. Was any part of the purchase price of the 50-acre tract of land conveyed by deed from W. D. Lamm and wife to Griffin H. Holloman paid by the said Griffin H. Holloman out of the individual funds of his wife, Ziney Holloman? Answer: Yes.

2. If so, what portion of the purchase money so paid was the individual property of the said Ziney? Answer: One-fourth.

3. Is the cause of action of the plaintiff barred by the statute of limitations? Answer: Yes.

Judgment was rendered upon the verdict in favor of the defendants, and the plaintiff appealed.

E. B. Grantham for plaintiff.

Finch & Vaughan and J. Crawford Biggs for defendants.

PER CURIAM. The answer to the third issue is a complete bar to the right of action of the plaintiff; and as no error is alleged in the determination of that issue, it is unnecessary to consider exceptions relating to the other issues. *Hamilton v. Lumber Co.*, 160 N. C., 52.

No error.

R. D. LUPTON v. NATHAN SPENCER ET ALS.

(Filed 2 October, 1918.)

PROCESSIONING PROCEEDING, tried before *Calvert, J.*, at Fall Term, 1917, of PAMLICO, upon these issues:

1. Is the line marked on the map, O, N, M, A, the true dividing line between the plaintiff, Lupton, and the defendant, Sawyer? Answer: No.

2. Is the line marked on the map, R, S, T, U, V, W, K, A, the true dividing line between the plaintiff, Lupton, and the defendant, Sawyer? Answer: Yes.

3. Is the line marked on the map, A, B, C, D, E, F, G, H, I, J, the true dividing line between the plaintiff, Lupton, and the defendant, Spencer? Answer: No.

4. Is the line marked on the map, A, K, J, the true dividing line between the plaintiff, Lupton, and the defendant, Spencer? Answer: Yes.

5. Did plaintiffs wrongfully cut and remove trees and timber from defendant W. R. Sawyer's land, as alleged? Answer: Yes.

6. If so, what damage is defendant Sawyer entitled to recover of the plaintiffs for such wrongful cutting and removal? Answer: $65.

Moore & Dunn for plaintiff.

H. L. Gibbs, E. A. Daniel, Jr., A. D. Ward, and W. F. Ward for defendants.

PER CURIAM. There are thirty-five assignments of error relating to the evidence, and four to the charge of the court. We are of opinion that they are without substantial merit, and that no reversible error has been committed.

The issues relate solely to the true location of the dividing line between the lands of plaintiff and defendant, and present almost exclusively a question of fact, which has been settled by the verdict.

No error.

J. L. EFLAND v. A. G. BLANCHARD AND J. W. THOMASSON.

(Filed 23 October, 1918.)

ACTION tried before *Stacy, J.*, at June Term, 1918, of WAKE, upon these issues:

1. Is the defendant, J. W. Thomasson, indebted to the plaintiff? If so, in what amount? Answer: Yes, $272.70, plus $44.40, with interest from 1 November, 1915.

2. Was the signature of A. G. Blanchard to the paper-writing referred to in the complaint obtained by the mutual mistake of the plaintiff's agent, N. C. Harris, and the defendant A. G. Blanchard, as alleged in the defendant's answer? Answer: No.

3. Was the signature of A. G. Blanchard to the paper-writing described in the complaint procured by the fraud of the plaintiff's agent, N. C. Harris, as alleged in the defendant's answer? Answer: No.

4. Was the paper-writing described in the complaint signed by the mistake of A. G. Blanchard induced by the fraud of the plaintiff's agent, N. C. Harris, as alleged in the defendant's answer? Answer: No.

5. Is the defendant A. G. Blanchard indebted to the plaintiff? Answer: Yes, $272.70, plus $44.40, with interest from 1 November, 1915.

From the judgment rendered defendant appealed.

A. J. Fletcher and Jones & Bailey for plaintiff.
Douglass & Douglass for defendant.

PER CURIAM. The eight assignments of error relate to the rulings of the court upon the evidence. Upon an examination of them, we think they are without merit.

The issues presented are largely disputed questions of fact, and appear to us to have been settled by the verdict.

No error.

B. S. HERRING v. WILLIAM WALL AND WIFE.

(Filed 9 October, 1918.)

Appeal and Error — Verdict — Judgment — Landlord and Tenant—Leases—Counterclaim.

Where the leased building was not completed or ready for occupancy at the time stated in the contract, and in the lessor's action to recover the rent the lessee alleges as a counterclaim that he had been obliged to rent another building at the same rental price, and had paid under protest the rent to the plaintiff during that period, a verdict of the jury, upon the evidence and under proper instructions, allowing both the demand and the counterclaim, renders immaterial and irrelevant the answer to an issue as to the payment under protest, ratification, etc., and a just verdict and judgment thereon having been established, they will not be disturbed on appeal.

APPEAL by plaintiff from *Kerr, J.*, at May Term, 1918, of WILSON.

This action began in the justice's court to recover $150 rent for April, May, and June, 1917. There were no written pleadings, and there is no

real controversy about the facts, which are, that the plaintiff leased to the defendant a building for ten years, beginning 1 January, 1917. The building was not ready for occupation till after 1 April, but the defendant sent checks for each of the three months till 1 April—$50 per month—stating that he did so under protest. He paid rather than run the risk of having the lease canceled, so he testifies. In the meantime he rented another building, which he used, for which he paid the same rent, and he pleads this as a counterclaim.

H. G. Connor, Jr., for plaintiff.
W. A. Finch and J. Crawford Biggs for defendants.

PER CURIAM. It is immaterial whether the plaintiff recover back the $150 because paid under protest, or whether he should ratify such payment and recover the $150 which he had to pay for another building as a counterclaim. The result is the same.

The case was evidently tried on the latter theory, for the first and third issues are:

1. Are the defendants indebted to the plaintiff, and if so, in what amount? Answer: Yes, $150.

2. Were the payments of rent for the months of January, February, and March, 1917, made by defendants to the plaintiff voluntarily? Answer: No.

3. Is the plaintiff indebted to the defendant upon his counterclaim? If so, in what amount? Answer: Yes, $150.

These issues disposed of the controversy. The second issue was irrelevant and immaterial.

The case on appeal states: "The court fully explained to the jury both the plaintiff's and defendants' contentions as to the defendants' counterclaim, and that the burden upon the third issue was upon the defendants to establish their contentions by the greater weight of the evidence, and fully and correctly explained to the jury the defendants' measure of damages, and if they answered the second issue 'No,' they should answer the third issue such amount as they find the defendants entitled to recover under the court's charge, bearing upon damages, heretofore given."

It is a matter of no importance whether the plaintiff was barred of recovery on the counterclaim for the $150 he had paid for the use of another building while kept out of the one he had leased, or whether defendant recovered back the $150 he had paid for the building he had not had. The case was evidently tried upon the theory of a counterclaim, according to the first and third issues, and the second issue was immaterial.

The defendants should not be put to the expense and annoyance of

another trial, when the justice of the case has already been attained by the verdict and judgment, whose effect is that the plaintiff shall not have rent for the three months during which he failed to furnish the defendant the building. The plaintiff was certainly responsible to the defendants to the extent of the three months rent of the building which he did not furnish, as damages, by way of counterclaim. The result is just and right, and should stand.

No error.

H. D. SLOAN v. COOPER GUANO COMPANY.

(Filed 9 October, 1918.)

Instructions—Appellant's Evidence—Evidence—Questions for Jury—Trials.

Instructions predicated upon the appellant's version of the contract sued on, which was for the determination of the jury under conflicting evidence, are properly refused.

APPEAL by Sloan & Company from *Calvert, J.*, at Fall Term, 1918, of SAMPSON.

These were two actions, originally; the first action being entitled H. D. Sloan v. Cooper Guano Company and W. B. Cooper; the second action being entitled Cooper Guano Company v. H. D. Sloan. By consent, the two actions were consolidated and tried together. Upon the trial it was admitted that H. D. Sloan was indebted to Cooper Guano Company in the sum of $697.54, with interest thereon from 11 November, 1916, and that Cooper Guano Company was the owner of and entitled to the possession of the property described in the affidavit of claim and delivery filed in the case of Cooper Guano Company v. H. D. Sloan, and that the value of said property at the time of seizure was $1,000. Issues were submitted in conformity with this agreement, and answered by the court, as will appear in the judgment.

The only questions for the consideration of the court arose upon the complaint in the case of H. D. Sloan v. Cooper Guano Company, and the counterclaim set up in the answer of H. D. Sloan in the case of Cooper Guano Company v. H. D. Sloan, alleging that the Cooper company agreed to pay Sloan 50 cents per ton on all fertilizers sold to the members of the Farmers' Union in Sampson County, which was denied by the Cooper company. Both parties introduced evidence in support of their claims.

The jury returned a verdict in favor of Sloan, and the Cooper Company appealed from the judgment rendered thereon.

I. C. Wright and Fowler & Crumpler for plaintiff.
Grady & Graham for defendant.

PER CURIAM. The controversy is one entirely of fact dependent upon the terms of the contract, which the jury has resolved against the appellant.

Most of the exceptions are to the refusal to give certain instructions, which were predicated on the version of the contract given by the Cooper company, and could not have been given, because they required the judge, and not the jury, to decide the fact.

We find no error in the trial.

No error.

CHARLES RAULF, ADMR. OF FRANK RAULF, v. ELIZABETH CITY LIGHT AND POWER COMPANY.

(Filed 13 November, 1918.)

1. **Electricity—Negligence—Evidence—Trials—Questions for Jury.**

Evidence tending to show that defendant, supplying electricity for motor power, was under contract to furnish a drug store with electricity, over a wire carrying a safe voltage, for operating mixing appliances for "soft drinks" at a fountain, and that plaintiff's intestate, employed there, was killed by a heavy voltage of electricity coming suddenly upon the wire from the primary wire of the defendant, because of insufficient insulation of the outside wires, misplacing of the poles, and delay in cutting out the current, etc., is held sufficient upon the issue of defendant's actionable negligence.

2. **Evidence—Impressions—Collective—Facts—Electricity.**

Where there is evidence that the defendant's wires, heavily charged with a deadly current of electricity, came in contact with another and harmless wire of the defendant, and caused the death of the plaintiff's intestate, it is competent for an eye-witness to testify that where the wires crossed they made a short circuit, producing light, indicating that the wires had not been properly wrapped, such being his impression of facts under his immediate observation and within his experience.

3. **Appeal and Error—Evidence—Harmless Error.**

The trial judge cures evidence erroneously admitted by striking it out, so informing the jury and instructing them not to consider it.

4. **Evidence —Expert— Electricity— Issues— Appeal and Error — Harmless Error.**

Where the defendant's liability for the killing of the plaintiff's intestate is made to depend upon its negligence in permitting an improperly insulated wire, admittedly charged with a deadly current of electricity, to

come in contact with an otherwise harmless wire, thus producing the death, a question asked an expert, and affirmatively answered, "whether the conditions arising on the facts stated, if so found by the jury, would naturally and inevitably lead to intestate's death," while not approved, is not held for reversible error, there being no question of the deadliness of the current, and not objectionable as involving the very fact the jury were to pass upon.

5. **Negligence—Electricity—Primary Liability—Secondary Liability.**

Where the evidence tends only to show that the plaintiff's intestate was killed by a harmless service wire furnished to his employer by an electric power company becoming suddenly charged by a deadly current of electricity from the primary wire of the power company, and that the intestate's employer had only contracted for the use of a wire not dangerous to human life, as between the power company and the employer of the intestate, the question of primary and secondary liability does not arise in an action against them both.

6. **Actions—Nonsuit—Torts—Joint Tort Feasors—Appeal and Error.**

An action against joint tort feasors may be maintained against either, or both, at the election of the party injured, and a nonsuit as to one of them is not error as to the other.

ACTION tried before *Bond, J.*, and a jury, at February Term, 1918, of PASQUOTANK.

The action was to recover damages for alleged negligent killing of plaintiff's intestate, and there was evidence tending to show that, in November, 1916, intestate, a vigorous young man, was working as an employee in the drug store of Pendleton & Perry; that there was used in this store, for the purpose of mixing milk shakes and other drinks, an appliance operated by electricity supplied by the Light and Power Company over a service wire running into said store, and, under a contract that said power be furnished of 110 volts, shown to be harmless to the operator; that on the occasion in question, as intestate, in the course of his employment, put up his hand to turn on the power for the purpose of preparing a malted milk to drink, he received a severe electric shock, killing him almost immediately, the attendant circumstances tending to show that the service wire had been unexpectedly charged with a tremendous current of electricity. There was further evidence to show that this overcharge was caused by the breaking of the power or primary wire of the defendant, the Electric Light and Power Company, carrying a current of 2200 or 2300 volts, and its coming in contact with the service wire running into the store of the defendants Pendleton & Perry, and that both wires were improperly and insufficiently protected, etc.

At the close of the entire testimony, on motion, a nonsuit was ordered as to the individual defendants, Pendleton & Perry, and, on denial of liability and plea of contributory negligence, with supporting evidence tending to negative negligence on the part of the remaining defendant,

the Light and Power Company, the cause was submitted to the jury on appropriate issues. Verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed, assigning errors.

J. C. Brooks, J. B. Leigh, Ward & Grimes, and C. E. Thompson for plaintiff.

L. T. Seawell, W. A. Worth, and Aydlett, Simpson & Sawyer for Power Company.

Ehringhaus & Small and Meekins & McMullan for defendants Pendleton & Perry.

PER CURIAM. There was ample evidence of negligence on the part of defendant, the Light and Power Company, both as to insufficient insulation of its wires, their improper placing on the poles, the primary wire being too near the service wires, and also in the failure of the defendant company and its employees to shut off the current in time after the primary wire had broken, and defendant knew it, or had fair opportunity to know it, and of the dangers that imminently threatened by reason of the conditions presented. There was some opposing testimony from defendants tending to negative negligence on its part, but, under a full and fair charge, the jury having accepted plaintiff's version of the occurrence, his right to recover is clearly established, and we find no reason for disturbing the result.

On the argument, it was earnestly urged for error that a witness who had testified to the unusual conditions he discovered at the place where the primary wire had broken, "That he had noticed overhead where two wires had crossed, forming a short circuit, and that every few minutes it would light up the whole place," and that he heard snapping and popping of electric wires overhead, etc., was asked, "What did the disturbance indicate?" and was allowed to answer, over defendant's objection, "It looked as if it was coming from the wires not being properly wrapped." The testimony giving the impression of the witness as to facts under his immediate observation and well within his experience, there would seem to be no valid objection to the evidence. *Jones v. R. R.*, at the present term, citing *Britt v. R. R.*, 144 N. C., 242; *Tire Setter Co. v. Whitehurst*, 148 N. C., 446. The question and answer were later withdrawn by leave of court, his Honor telling the jury that both were stricken out and would not be considered by them. If, therefore, error was presented here, we are of opinion that, on the facts of this record, the same was cured. Again, it was insisted that error was committed in certain questions and answers appearing in the evidence of the witness, H. P. Charles, an expert electrician, examined in behalf of plaintiff. Without setting out the questions in full, which are very elaborate, they

are well within the domain of expert evidence, embody every fact essential and relevant to the occurrence spoken to by the witness as to the cause of intestate's death, and are put on the supposition that the jury shall find these facts to be true, and we find no reversible error, either in the questions or answers. The words appearing in one of these questions, "whether the conditions arising on the facts stated would naturally and inevitably lead to intestate's death," are not in form to be approved, but there was no serious contention that if the primary wire, carrying 2300 volts, came in contact with the service wire running into the drug store, that it would produce death. The expert witness for defendant, in effect, testified to the same thing, and, on the record, we think the rather insistent words objected to may not be held for reversible error. It is not unlike the case presented in *Lynch v. Mfg. Co.*, 167 N. C., pp. 98-101, where, in the question to the expert as to the cause of death, the word used was the proximate cause of the death. The term, while disapproved, was held to have worked no harm to appellant, the facts showing that, if the cause, it was undoubtedly the proximate cause. Nor is the question objectionable as embodying the very fact the jury were to pass upon. The question directly at issue was not whether the contact between the service wire and primary wire, carrying 2300 volts, would produce death—about this, as stated, there was no serious dispute—but whether, in the case presented, this contact had been caused by defendant's negligence.

It was further contended that the court committed error, to defendant's prejudice, in ordering a nonsuit as to individual defendants, Pendleton & Perry. We are inclined to concur in the judgment of his Honor as to these defendants; but in no event, on the facts presented, could this order of nonsuit be held for reversible error. It is the settled rule in cases of this character that "where the wrongful acts of two or more persons concur in producing a single injury, and with or without concert between them, they may be treated as joint tort feasors and, as a rule, sued separately or together, at the election of plaintiffs" (*Hipp v. Ferral*, 169 N. C., 551-554, citing *Hough v. R. R.*, 144 N. C., 692; 38 Cyc., pp. 488, *et seq.*); and while we have held that, at the instance of a defendant, the other wrong-doers may be made parties, this is only in cases where, on the facts presented, there is a question of primary and secondary liability between them; but, in this case, the defendant's liability having been established on the ground that it negligently allowed its primary wire, carrying 2300 volts of electricity, to come in contact with its service wire, running into the drug store, which they were under contract to supply with 110 volts, no such position could be for a moment maintained by it, and the nonsuit of its codefendant has therefore

worked them no injury. *Gregg v. Wilmington,* 155 N. C., 18. The other exceptions are without merit, and, on the record, the judgment for plaintiff must be affirmed.

No error.

CHARLIE ADAMS v. J. E. FOY AND DERMOT SHEMWELL, TRADING AS FOY & SHEMWELL, AND J. E. WORKMAN, JR.

(Filed 13 November, 1918.)

1. Principal and Agent—Declarations—Evidence.

Neither the fact of agency nor the extent of the supposed agent's authority can be proved by his declarations alone.

2. Same—Salesman—Automobiles—Nonsuit—Trials.

Testimony that on a former occasion one representing himself to be defendant's agent tried to sell the witness an automobile, and at the time of the admitted negligence, while driving defendant's automobile from one of defendant's garages to another in a different town, he had renewed his efforts to sell the car of the defendant, which he was driving, and defendant's admission of liability when the supposed agent was engaged for him in the capacity of salesman, is sufficient for the determination of the jury upon the question, and a judgment as of nonsuit upon the evidence is properly refused.

APPEAL by defendant from *Adams, J.,* at February Term, 1918, of DAVIDSON.

This is an action against J. E. Workman, Jr., and Foy & Shemwell, for injuries to plaintiff's horses in an automobile collision. The automobile was driven by Workman, and the collision occurred on the public road between Lexington and Thomasville, at night. The car which Workman was running was the property of one McIlvaine, of Wilmington, N. C., and which had been left at the garage of Foy & Shemwell at Lexington, and which was taken out by Workman in the evening, and he, with a friend, Dr. Kibler, drove over to Thomasville, and at the time of the collision they were returning.

Workman was employed by Foy & Shemwell as salesman for Ford cars in certain territory.

Plaintiff recovered judgment, and Foy & Shemwell appealed.

Plaintiff alleges that at the time of the injury Workman was in the employment of Foy & Shemwell and on business for his employers.

Foy & Shemwell deny that Workman was on any business for them at the time of the injury.

It was not contended that there was no evidence of negligence against Workman.

A witness for the plaintiff was permitted to testify, over the objection of the defendants, that in the summer before the collision Workman tried to sell him an automobile for Foy & Shemwell; that he reached the place of the collision a few minutes after it occurred, and found Workman and others there, and that Workman asked him if he did not want his new automobile, and tried to sell him one. The defendants excepted.

There was a motion for judgment of nonsuit by Foy & Shemwell, which was overruled, and the defendants excepted.

H. R. Kyser and Walser & Walser for plaintiff.
Raper & Raper for defendants.

PER CURIAM. The principle for which the defendants contend is well settled, that neither the agency nor the extent of the authority of the agent can be proven by the acts and declarations of the agent, and that these acts and declarations are not admissible against the principal until evidence of the agency *aliunde* has been offered (*West v. Grocery Co.*, 138 N. C., 168), but the evidence objected to by the defendants was not offered for such purpose.

The agency and the authority to sell were shown by the admission of the defendant Shemwell to Sink, that Workman "worked for him"; by the evidence of Dr. Kibler, that "he (Workman) was selling automobiles for them" (Foy & Shemwell); by the evidence of Shemwell, that "at the time of the accident Mr. Workman was a salesman for Foy & Shemwell for Lexington territory," and, the agency and authority being established, at least *prima facie*, it was competent to prove that at the time of the collision the agent was "engaged in that which he was employed to do"—trying to sell automobiles, which is the meaning of acting within the scope of the employment. *Jackson v. Tel. Co.*, 139 N. C., 353.

Nor do we think the motion for judgment of nonsuit, based upon the position that there is no evidence that Workman was acting within the scope of his employment at the time of the collision, can be sustained. He was using a car taken from the garage of Foy & Shemwell at Lexington, and, according to the evidence of a witness for the defendant, he drove it to the garage of Foy & Shemwell at Thomasville. Neither of the defendants testified that the use of the car was without permission, and apparently Workman had no business except between the two garages of Foy & Shemwell. He tried to sell a car a few minutes after and at the place of the collision, and this is what he was employed to do, and when the plaintiff went to see Foy & Shemwell about the payment of damages Shemwell said "he was not responsible for the troubles that Workman got into while he was out; that he worked for him, but he was not responsible for his troubles."

What did Shemwell mean by this statement? Was it that he denied liability when Workman was "out" selling machines, or when he was "out" on his own business? Did he mean he worked for him generally, or that he worked for him at the time of the collision, the one thing he was discussing with the plaintiff?

These are questions which the jury alone could settle, and they were properly submitted to them.

There are other exceptions, but they depend on those discussed.

No error.

STOKES-GRIMES GROCERY COMPANY v. JAMES M. HILL, TRUSTEE OF S. A. HAUSER ET AL.

(Filed 4 December, 1918.)

Appeal and Error—Modification of Judgment by Consent—Case Remanded—Costs.

Where the parties have agreed to a modification of the judgment appealed from, the cause will be remanded to the Superior Court to be proceeded with accordingly, taxing the cost of appeal upon them equally.

APPEAL by defendant from *Harding, J.*, at April Term, 1917, of SURRY.

This is an action for a settlement of the estate of S. A. Hauser, in the hands of J. M. Hill, trustee, and to compel the said trustee to sell certain lands conveyed to him by deed of assignment.

Judgment was entered in favor of the plaintiff, and the defendants appealed.

Carter & Carter and T. W. Kallam for appellees.

W. L. Reece, J. H. Folger, and J. S. Manning for appellants.

PER CURIAM. When this appeal came on for hearing, it was agreed between the plaintiff and defendants, through their respective counsel, that the judgment appealed from, being the one entered at April Term, 1917, of the Superior Court of Surry County, be modified and amended, so that it would order and direct the said Hill, trustee, to sell all the lands conveyed to him by the said Hauser by deed of assignment, remaining unsold, except so much thereof as is covered and embraced within the homestead of the said Hauser, as heretofore allotted to him, and, as so modified and amended, that it be affirmed.

The cause is therefore remanded to the Superior Court, in order that the said judgment of April Term, 1917, be modified and amended as herein set forth.

The costs of this appeal will be equally divided between the plaintiffs and the defendants.

Remanded.

WILKERSON & BOWLES v. J. C. PASS ET ALS., TRADING AS PASS, WOODY & LONG.

(Filed 4 December, 1918.)

1. **Appeal and Error—Evidence—Verdict—Instructions—Trials.**

   Exception that the verdict or instructions to the jury was not supported by the evidence, upon a phase of the controversy upon which the trial had proceeded without objection, comes too late after verdict.

2. **Contracts—Breach—Notice—Buildings.**

   A failure of the owner to give the notice required by a building contract before taking it from his contractor is a breach of the contract; and where the evidence is conflicting, and the jury have found, under a correct charge, that such notice had been given, the verdict upon that phase of the controversy will not be disturbed.

3. **Contracts— Breach— Ability to Perform— Evidence— Rebuttal — Cross-Examination.**

   Where the plaintiff sues for damages for the defendant contractor's breach of a building contract, alleging that he had at all times been ready, with material, workmen, etc., to perform his part, it is competent on his cross-examination for defendant to examine him in relation to a judgment taken against him on a note as tending to disprove his evidence as to his financial condition or ability to complete the contract sued on.

4. **Contracts—Instructions— Buildings— Payments— Conditions— Requested Instructions.**

   Where the owner, under the terms of a building contract, is obligated to pay his contractor 80 per cent of the contract price during the progress of construction, etc., "upon itemized estimates made by the contractor and approved by the architects or superintendents," a request for instruction is properly refused which makes the question of the owner's breach of the contract in this respect to depend upon whether the payments had been made, without reference to the prescribed conditions under which they were to have been done.

5. **Appeal and Error—Instructions—Correct as a Whole—Harmless Error.**

   Where a charge construed as a whole does not prejudice the appellant's rights, error as to fragmentary parts will not be held as reversible.

APPEAL by plaintiff from *Bond, J.*, at April Term, 1918, of DURHAM.

This is an action to recover damages for breach of a building contract.

On 9 January, 1917, the plaintiffs entered into a contract with the defendants to rebuild a certain brick store building in the town of Roxboro, which had been destroyed by fire, for which the defendants agreed to pay plaintiffs the sum of $15,700; 80 per cent of the contract price to be paid to the contractors on the work during the progress of its construction and completion, upon itemized estimates made by the contractors and approved by the architects, and the remaining 20 per cent was to be paid to the contractors upon the completion of said building.

The plaintiffs agreed to complete said building within one hundred working days from the date the contract was signed.

Paragraph 11 of the contract is as follows: "Should the contractors become bankrupt, or refuse or neglect to furnish a sufficiency of properly skilled workmen, or of materials of proper quality, and, these facts being certified by the architects in writing, the owners shall be at liberty, after five days written notice, to provide any such labor or materials, and charge same to the contractors, or to employ some other contractors to furnish the necessary materials, and finish said work, at the most reasonable prices obtainable for such work, and to deduct the cost of same from any payments then due or thereafter to become due to the contractors under this contract, and the amount remaining, if such there be, after the completion of the said work, shall be paid to the contractors or their authorized agent."

Purporting to act under the authority contained in paragraph 11 of the contract, and after notice to the plaintiffs, defendants terminated the contract with them and awarded the contract for the completion of said building to Smoot & Sheehan, who completed it at an increased cost to the defendants of more than $8,000. After the termination of the contract by the defendants, the plaintiffs instituted this action to recover damages which they allege they sustained by reason of the alleged wrongful termination of the contract. The defendants set up a counterclaim to recover damages which they allege they sustained by reason of the failure of the plaintiffs to complete their said contract. At the trial of the action the jury answered the issues as follows:

1. Were the plaintiffs, Wilkerson & Bowles, wrongfully prevented completing the building and carrying out their contract by any acts of the defendants? Answer: "No."

2. If so, what damages, if any, did the plaintiffs, Wilkerson & Bowles, sustain? Answer:

3. Did the plaintiffs, Wilkerson & Bowles, wrongfully fail to comply with and carry out their contract concerning the erection of the building? Answer: "Yes."

4. If so, what damages did the defendants, Pass, Woody & Long, sustain thereby? Answer: "$8,000."

Judgment was entered in favor of the defendants, and the plaintiffs appealed.

Brawley & Gantt for plaintiffs.

W. D. Merritt, B. M. Watkins, and Fuller, Reade & Fuller for defendants.

PER CURIAM. Counsel for the plaintiff earnestly insist before us that there is no evidence that the defendants gave the plaintiffs five days notice of the termination of the contract, but an examination of the record shows that there was no request to so instruct the jury, and no exception or assignment of error presenting the question, and the objection that there is no evidence to support a verdict or finding cannot be taken for the first time after verdict. *S. v. Leak,* 158 N. C., 643; *Moon-Taylor Co. v. Milling Co.,* at this term.

The case was tried upon the theory that there was evidence that the notice had been given, and the court instructed the jury on the question of notice as follows, presenting fully plaintiffs' contention:

"It being admitted by the defendants that the contract was terminated by them on 7 July, 1917, the burden would be on the defendants to satisfy you from the evidence that they had a right to terminate same under the provisions of said contract, and to show further that they have given the plaintiffs the written notice required by the terms of the contract, to wit, five days, and if they have failed to do so, you would answer the first issue 'Yes.' The court charges you that the defendants could not fail and refuse to comply with the provisions of the contract on their part, and later undertake to take advantage of the failure of the plaintiffs to comply with the provisions of the contract on their part and terminate the contract; and if you find these to be the facts, from the evidence and the greater weight thereof, the burden being on the plaintiffs, then you would answer the first issue 'Yes.'

"In any event, the defendants could not terminate the contract without complying with the provisions of paragraph 11 of the contract, in regard to giving the certificate and the five days written notice, and if the defendants terminated the contract without complying with the provisions of the contract, then the court charges you that this would be a wrongful termination of the contract on the part of the defendants, and they would be responsible and answerable to the plaintiffs in damages under the law as to the measure of damages which I have given you."

The first and second exceptions are to permitting the defendants to examine the plaintiff in regard to a note for $1,000 executed by him to the Citizens National Bank of Durham, on which judgment had been obtained.

The plaintiffs alleged and undertook to prove that they had not violated their contract, and that they had at all times a sufficient amount of material of proper quality and a sufficient number of properly skilled workmen to complete the building in the time called for in the contract.

The defendants undertook to show that the plaintiffs had wrongfully failed and refused to complete the building according to the terms of the contract, and that their failure to complete said building was due to the fact that they were financially unable to furnish sufficient material of proper quality and a sufficient number of properly skilled workmen to carry on said work, and the evidence was therefore competent on the question of the ability of the plaintiff to perform his contract.

The plaintiffs requested his Honor to charge the jury as follows, which was refused, and the plaintiffs excepted:

"If the jury should find from the evidence, and from its greater weight, the burden being on the plaintiffs, that the defendants failed to comply with the provisions of paragraph 12 of said written contract and pay the plaintiffs the 80 per cent of the contract price to the contractors or plaintiffs on the work during its progress of construction, and if you should find from the evidence and its greater weight, the burden being on the plaintiffs, that this failure on the part of the defendants to perform the provisions of said contract on their part prevented and delayed plaintiffs from the performance of the provisions of said contract on their part, then and in that event plaintiffs would not be responsible for any such default, and you would answer the first issue 'Yes.'"

It would have been error to refuse this instruction if the defendants had agreed to pay 80 per cent of the contract price during the progress of the work, but this was not the agreement of the parties. The defendants agreed in paragraph 12 to pay 80 per cent of the contract price "during its progress of construction or completion, upon itemized estimates made by the constructors and approved by the architects or superintendents," and there is no evidence that they failed to do so.

The other exceptions are either to the statements of the contentions of the parties, which were made impartially, or to parts of the charge which, when considered in connection with the whole charge, are free from objection.

No error.

STATE v. GENEVA JONES.

(Filed 30 October, 1918.)

1. **Homicide—Murder—Accessory—Criminal Law—Evidence—Statutes.**

Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. Revisal, sec. 3287.

2. **Homicide—Murder—Evidence—Accomplice.**

The unsupported testimony of an accomplice is sufficient for conviction of murder, though evidence of this character should be received with caution, and the court, in his discretion, may so instruct the jury.

3. **Evidence— Witness— Prisoner — Under Death Sentence — Expiration of Sentence—Habeas Corpus—Statutes.**

When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of *habeas corpus, ad testificandum* (Revisal, sec. 1855) is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead, in the eye of the law, could not testify, the witness having been present and having testified.

APPEAL by defendant from *Bond, J.*, at May Criminal Term, 1918, of DURHAM.

The defendant was convicted as an accessory before the fact to the murder of her husband, Robert Jones, by one Lonnie Council. Council had been convicted, at a previous term, of murder in the first degree, and was in the State's Prison at Raleigh, awaiting execution, at the time of the trial of the defendant herein.

Defendant, at the close of State's evidence, moved for judgment as of nonsuit under the statute, and the motion being overruled, defendant excepted.

Lonnie Council testified, among other things: "She (the defendant) spoke that day something about what I and her had been talking about and what she asked me to do. She wanted me to kill him; said he was no account to her—couldn't do any work for her. She said she didn't want him." . . .

Q. "Did you agree to kill him for her?" A. "I didn't exactly agree to do that until the night we come back from the burial, and she told me what time he would come down to this short-dog train. He was working for the railroad. She told me he would come in on the 6:30 train, going towards Raleigh, eastbound. Where he got off would be at the coal chute, and right there was where I would meet him, and I could do what she asked me to do."

This conversation occurred on the day before Lonnie Council killed Robert Jones at the coal chute, the killing occurring on 8 February, 1918. Soon after his arrest, and while in jail, he made a similar statement to J. W. Stone and to E. G. Belvin.

It appeared that the time fixed for the execution of Council in the sentence of death pronounced at the time of his trial had expired at the time of the trial of this action, and the defendant objected to his examination as a witness because the time for his execution having passed, he was dead, in the eyes of the law, and, further, if not dead, he was under sentence of death and could not be brought to the trial to testify.

Objections overruled, and the defendant excepted.

There was a verdict of guilty and a judgment of imprisonment for life, from which defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. O. Everett for defendant.

ALLEN, J. The statute (Rev., sec. 3287) defines an accessory before the fact as one who "shall counsel, procure, or command any other person to commit any felony," and the testimony of Council clearly comes within the statute, as it shows that the defendant counseled and procured the commission of the crime.

The credibility of the witness was for the jury, as it is established by a long line of authorities in this State that while the evidence of an accomplice ought to be received with caution, and that the court in its discretion may so instruct the jury, it is sufficient, uncorroborated, to support a verdict of guilty. *S. v. Honey,* 19 N. C., 390; *S. v. Holland,* 83 N. C., 624; *S. v. Barber,* 113 N. C., 713; *S. v. Shaft,* 166 N. C., 409.

The motion for judgment of nonsuit was therefore properly overruled.

The objection that Council was disqualified because, being under sentence of death, a writ of *habeas corpus ad testificandum* could not issue to compel his attendance, under Revisal, sec. 1855, is met by the decisions in *S. v. Adair,* 68 N. C., 68, and *Ex parte Harris,* 73 N. C., 65, holding that this statute does not apply to the State, and the objection that the witness was dead, by the fact that he was present in the flesh.

No error.

STATE v. GEORGE ATWOOD.

(Filed 30 October, 1918.)

1. Homicide—Murder—Notice—Evidence—Trials.

When there is sufficient evidence to establish the fact that the prisoner, on trial for murder in the first degree, had committed the homicide, it is competent to show that the deceased had $180 on his person on the evening before his body was found, when he and the prisoner were drinking together, and had only a few dollars the following morning, and that the prisoner soon thereafter, when arrested, had $246 on his person, as tending to show that robbery was the motive of the homicide.

2. Homicide—Murder—Evidence—Instructions.

Where the prisoner, accused of murder, has denied committing the crime, and that he had dragged the body from his door and covered up the signs thereof with sand, which the evidence tended to show had been done, and thereafter admitted the killing and dragging the body away, but relied upon justification, it is for the jury to estimate the weight to be given to his explanation, under all the circumstances leading up to the killing and connecting him with it; and a request for instruction that the jury could only consider his removing the body, as it may throw light on the killing, and if this had been done under circumstances justifying it, they could not consider the evidence of the removal of the body as being a crime, was properly refused.

3. Homicide—Murder—Character—Substantive Evidence.

Where the prisoner, accused of a homicide, testifies to matter in justification or to disprove inferences to be drawn from the evidence against him, he puts his character at issue, both as a witness and defendant, and the jury may consider the evidence of character as substantive evidence whether he would or would not commit a crime of the kind charged against him.

4. Appeal and Error—Objections and Exceptions—Restrictive Evidence—Criminal Law.

Where a witness, charged with a crime, has taken the stand in his own behalf, and the State has introduced evidence of his bad character, he may not complain that it was not restricted to his character as a witness, unless he has asked at the time of its admission that it be so restricted. Supreme Court Rule No. 27.

5. Criminal Law—Restrictive Evidence—Character—Rebuttal.

A prisoner charged with a crime, and who has testified in his own behalf, may not put on evidence in rebuttal of that of the State tending to show his bad character, and have it confined to his credibility as a witness.

6. Homicide—Murder—Deadly Weapon—Malice— Presumptions— Evidence.

Where a homicide is admitted or proven to have been done with a deadly weapon, the law presumes malice, and the burden is upon the prisoner to show matters in excuse or mitigation.

STATE *v.* ATWOOD.

APPEAL by defendant from *Lane, J.*, at July Term, 1918, of FORSYTH.

The prisoner was indicted for murder and convicted of murder in the second degree, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. E. Holton and Fred M. Parrish for defendant.

CLARK, C. J. The prisoner was indicted for murder of Ed Hege and was convicted of murder in the second degree. The deceased was killed by a pistol shot which severed the femoral artery. He and the prisoner had been drinking together heavily the evening before, but separated about 1 o'clock at night. A witness for the State testified that he heard the pistol shot from the direction of the prisoner's house about half-past 1 at night, and about 6:30 a. m. he found the body of the deceased lying about one lot distant from the front of the defendant's lot. The prisoner came up, and when asked if he knew who the dead man was, he walked up to the body and, looking at it, said, "No, I do not know him," and went back home. After his arrest, the prisoner admitted to the sheriff that he had killed the deceased, and he and his wife both testified to the fact on the trial. He testified that, hearing some one hail, he went to the door. The person standing out there said he wanted to see him. The prisoner says he asked who he was four or five times, and then told him to move away or tell his business, and that when neither was done, he drew out his pistol and fired; that the deceased then said, "You shot me," and the prisoner says that for the first time he then recognized the voice of the deceased. He says he did not intend to kill the man, but it does not appear that he went out and offered any help. There was a pool of blood where the deceased was standing when he was shot, in front of prisoner's house, and a trail of blood from that spot to the spot where his body was found, and signs that he had been dragged; but over the blood at the place of the homicide and along the trail sand had been swept, and there was some signs of the body having been dragged. At the trial he and his wife testified that they carried the body to the place where it was found, and that by the prisoner's direction the wife had swept sand over the pool of blood and the trail. There was also blood on the prisoner's shoes (one of which had been washed) and on his pants and one of his hands.

The first three assignments of error are to the admission of testimony that about a week before the homicide the deceased had $65 or $70 on his person; that on the afternoon of the homicide he was seen with a roll of greenbacks, and that he was paid $3.50 that afternoon. The sheriff testified that only $2 or $3 was taken out of the deceased's pockets at the

undertaker's. There was evidence that, the evening before, the prisoner had $180 on his person, and that when arrested he had $246. This evidence was competent upon the State's theory, upon the indictment for murder in the first degree, that robbery was the motive of the homicide. The jury negatived that theory by their verdict. In no view has the prisoner ground to complain.

Assignments of error 4 and 5 are because the judge refused to charge as prayed by the prisoner: "That in passing upon this case, the fact that an effort was made to conceal the act by removing the body cannot be considered by the jury, except as it may throw light upon the act of killing; that if the jury should find that the prisoner shot the deceased under circumstances justifying the killing, then they cannot consider the evidence of removal of the body as being a crime." There was no error in refusing to so charge. The jury was entitled to all the circumstances which led up to the killing, which explained it or connected the prisoner with the homicide. *S. v. Brabham,* 108 N. C., 793; *S. v. Plyler,* 153 N. C., 634. His action in attempting to dispose of the body, so as to divert suspicion from himself, was a relevant circumstance, tending to show guilt, and it was for the jury to estimate its weight, and whether his explanation and the motive he assigned were truthful or otherwise. The judge stated in a plain and correct manner the evidence and the contention for the prisoner on this point, and nothing more was necessary. If the jury found, as the prayer requests, that the prisoner was not guilty, because he killed the deceased under circumstances making it justifiable, it was unnecessary to add that "then they cannot consider the evidence of removal of the body as being a crime."

The prisoner excepted, further, that the court erred in allowing counsel for the State to argue to the jury: "That the character of the defendant shows that he is a person who would commit just such a crime as the one with which he was charged"; and also that the court charged as follows: "The prisoner contends, further, that in reply to evidence of his conviction of violation of law, that for recent months he has been a man of good character; that he was a man of good character, for truth and honesty; that he was worthy of belief, as far as testimony was concerned, and that there was evidence of his good character. Now, you can consider evidence of character as to the prisoner as substantive evidence, as testimony to show whether he would or would not commit such crime as he is charged with; also upon his credibility as a witness."

The prisoner, on cross-examination, admitted that he had been sentenced to the county roads for six months, and, having escaped, was carried back and served out his time; that he had been indicted twice in Forsyth County and that he had a pistol in his pocket the evening before.

The witness Lincoln Pope testified that he had known the prisoner

for eight years; lived wtihin half a mile of him, and that his general character was bad. J. J. Cofer testified that he had known the prisoner eight or ten years; that his general character was bad. On cross-examination, he said it was bad for selling liquor and resisting officers and being a dangerous man. L. Newsome testified that he knew the general character of the prisoner, and it was bad. W. H. Hauser testified that he had known the prisoner ten or twelve years, and that his general character was bad, but he had not heard it discussed for the past six months. Sheriff George W. Flynt testified: "I have known George Atwood about eight years and know his general character; it has been bad." All the above testimony as to character was after the prisoner had gone upon the stand as a witness in his own behalf.

The prisoner, among other testimony, in reply, offered in rebuttal to the testimony offered by the State as to the bad character of the defendant John F. Reynolds, who testified as follows: "I have known defendant for the last two or three years; have not heard anything against him. I never heard his character impeached, except for selling liquor. For truth and honesty I always considered it good"; and Sam Sides, who testified: "I know defendant's character for the last year or two, and have heard nothing against him for that time."

Prior to our statutes of 1866, ch. 43; 1868-'69, ch. 209, and 1881, ch. 110, now Rev., 1634 and 1635, which render the defendant in a criminal action competent, but not compellable, to testify in his own behalf, the State was not permitted to give evidence of the bad character of a defendant on trial for crime unless he himself first put his character in evidence. This was a protection to him, as his mouth was closed. Since the statute, if the defendant or prisoner elects to testify in his own behalf, he is before the jury, both as a witness and a defendant.

The prisoner strenuously insists, however, that it was only after he had testified in his own behalf, and the State had introduced evidence of his bad character, he put on proof of his good character, and that he offered this only to "rebut" the evidence of his bad character and not to put his character in issue. We know of no precedent and of no principle that entitled the prisoner, in putting on evidence of his good character, to have it restricted to his character as a witness, so as to avoid his character as a defendant being before the jury. The point attempted to be raised is too attenuated to be visible or practicable.

When the State offered evidence of the bad character of the prisoner, he did not ask that it should be restricted to his character as a witness. Rule 27 of this Court provides: "Nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks at the time of admission that its purpose shall be restricted."

Besides, before the adoption of this rule, which was designed to prevent such technical objections, the point had been decided in *S. v. Cloninger*, 149 N. C., 571, where the Court overruled an exception to the following charge: "Evidence as to the character of a witness who is likewise a defendant is competent for two purposes: (1) to enable the jury to place the proper estimate on the testimony of the defendant who is testifying as a witness; (2) as substantive evidence upon the question of guilt or innocence"; and said: "Where a defendant goes on the witness stand and testifies, he does not thereby put his character to an issue, but only puts his testimony to an issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. This is the rule laid down in *S. v. Traylor,* 121 N. C., 674, and *S. v. Foster,* 130 N. C., 676. But when a defendant introduces evidence himself to prove his good character, then that evidence is substantive and may be considered by the jury as such."

In this case, when the State put on evidence of the prisoner's bad character, he did not ask that it be restricted to his character as a witness, and when he offered evidence to "rebut," it was none the less evidence to his character, which, under the precedents, made it an issue in the trial, even under *S. v. Traylor, supra.*

But when the defendant goes upon the stand to prove his innocence, or rather to disprove the inference to be drawn from the evidence against him, it would seem that logically and necessarily he puts his character "in all capacities," whether as a witness or a defendant, in issue before the jury, and it becomes a fact or circumstance which they will necessarily consider in passing upon their verdict. The distinction sought to be drawn in *S. v. Traylor* would therefore seem to be an over-refinement in practice.

The Court properly instructed the jury that, where the killing is admitted or proven to have been done with a deadly weapon, the law presumes malice, and the burden is upon the prisoner to show matters in excuse or mitigation. *S. v. Burton,* 172 N. C., 940, a case which, according to the evidence of the prisoner, very much resembles the one at bar.

No error.

STATE v. NAPOLEON SPENCER.

(Filed 30 October, 1918.)

1. Homicide—Evidence, Circumstantial.

Where the prisoner, tried for a homicide, denies that he was present at the time, the State may show that he was present by circumstantial evidence, which, in this case, is held sufficient to be submitted to the jury.

2. Evidence—Maps—Homicide.

A witness may use a map of the premises where a homicide has been committed to explain and illustrate his evidence relevant to the guilt of the prisoner charged with the crime, when restricted to that purpose.

3. Evidence—Corroboration—Identity.

Where the accused has denied that he was present when the homicide, by shooting, had been committed, and a witness has testified as to his identity that he was a man she had seen leaving the locality soon thereafter, with further testimony that he was the same person who had shot at a dog on the road, such evidence is competent in corroboration of his identity as the one who committed the homicide, and also as to the fact that he had a pistol at the time.

4. Evidence—Homicide—Natural Evidence.

Where the appearance of a dog, as it returned home after being shot at by the prisoner accused of a homicide, is relevant to the inquiry, testimony as to his conduct is natural evidence, and an instantaneous conclusion of the mind from a variety of facts observed at the same time in regard to it is competent, under the doctrine of *S. v. Leak*, 156 N. C., 643, cited and applied.

5. Appeal and Error—Evidence—Unanswered Questions.

Where the answer to a question, objected to and excluded, was not given, it must be made to properly appear on appeal that the evidence sought would have been of material value to the appellant, so that the court may see that its exclusion has been prejudicial to him.

6. Evidence—Homicide—Identity—Opinion.

It is competent for a witness to give his impression or opinion as to the identity of the prisoner with a man she saw fire a pistol at a dog, from what she saw and knew of him theretofore, when relevant to the inquiry, upon the trial for a homicide.

7. Evidence—Corroboration—Statements to Others—Witnesses.

A witness may testify, in corroboration of his statements on the stand, that he had made the same or similar statements to other persons.

8. Evidence—Homicide—Footprints.

With other evidence tending to convict the prisoner of a homicide, it may be shown that his shoes fitted the footprints leading from the place of the crime, as a circumstance tending to show identity, its value as proof being greater or less, according to circumstances.

9. Evidence—Identification—Homicide—Clothes—Questions for Jury.

Where the prisoner, accused of homicide, has denied that he was at the place of the crime when it was committed, and there is evidence that a

man was then seen leaving the place wearing a white scarf, testimony that the sheriff had referred to the prisoner's wearing a white scarf, in his presence, without his denial, is competent; and as to whether the prisoner understood that it referred to the time of the homicide, or subsequently thereto, under the evidence in this case, was properly submitted to the jury, with correct instructions as to its bearing upon the case.

10. Evidence—Identification—Homicide—Reformatory.

Where a witness has testified that the prisoner on trial for a homicide was the same as a man she saw in a reformatory, it is competent to show that only one man with the prisoner's name had been in that reformatory, for the purpose of identification, in connection with the other and pertinent evidence in the case tending to show his guilt.

11. Evidence—Contradiction—Circumstance—Homicide.

Where the prisoner, on trial for homicide, denied he was at the place at the time of its commission, and has contradicted himself as to where he then was, stating among other things that he was at a certain theater, testimony of the owner of the theater in contradiction is competent as a circumstance to be considered by the jury.

12. Homicide—Murder—Evidence—Deadly Weapon—Manslaughter—Mitigation—Burden of Proof—Instructions.

Where the evidence tends to show that the homicide was committed with a pistol, fired by the accused three times, each shot taking effect, and that he shot the husband of the deceased as he afterwards approached the house, without evidence in his behalf tending to reduce the crime to manslaughter, and his sole defense was that he was not there at the time and consequently could not have committed the crime, with sufficient circumstantial evidence to convict him of it, there is no element of manslaughter in the case, and an instruction to the jury to that effect is proper.

13. Instructions — Contentions — Objections and Exceptions — Appeal and Error.

Misstatements made in the charge of the judge as to the contentions of the parties will not be considered on appeal when not called to the attention of the court at the proper time for him to correct them.

INDICTMENT for murder, tried before *Shaw, J.*, and a jury, at May Term, 1918, of SURRY.

The prisoner was charged with the murder of Mrs. Alva Hester, which is alleged to have been committed in Forsyth County on 5 March, 1918. The case, upon motion and affidavit of the prisoner, was removed to Surry County for trial.

It was not denied by the prisoner that Mrs. Hester was killed at the time stated, about 5:30 o'clock in the afternoon of Tuesday, 5 March, 1918, but he contended that he was not there at the time and took no part in the homicide. There is evidence tending to show that almost immediately after the reports of the pistol were heard, a man was seen going over a knoll, about 25 yards from the house where the Hesters lived. He was not recognized at the time, but the witness, James

Stanly, stated that he wore a dark suit and there was something white around his neck, above his coat. He did not see him well enough to know who he was. Further evidence tended to show that the prisoner was seen the same afternoon in that neighborhood, and walking in the direction of the house, and wearing a dark cap and coat, and having something white around his neck, and something over his face, so that you could not see it. He also had on goggles. John Ford, one of the witnesses, saw him pass when going in the direction of the Hester home, and his tracks were traced from that place to the Hester house, and a shoe put in his tracks which was found to fit it. The same evening, after the homicide had been committed, he was seen to come out of the woods and from the general direction of the Hester place. He returned to his home, and his mother stated to Mrs. Bean, her language being, "That's my boy, coming from his work, but that's a funny way for him to come from his work." He came in the back way from the direction of the Shady Mount schoolhouse. He was arrested in his room that very evening, and the goggles, clothes, overalls, scarf, and pistol were found there. He was in bed when the officers went to his home. He was asked where his pistol was, and replied that it was downstairs in his mother's room, but the officers turned up his pillow and found the pistol, which was of 38 caliber. The goggles were found behind the bed, where the ceiling and weather-boarding stopped. The warrant was read to him, charging that he had carried a concealed weapon—a pistol—to Mrs. Daniels, when he said that he was not the man, as the Hanes Knitting Mill, where he worked, did not close until 5:30 p. m. He was taken by the officers to Mr. Boyd's, where he was identified by certain witnesses as the man they had seen that afternoon. There was evidence contradicting his statements as to where he was during the afternoon when Mrs. Hester was killed. He had quit his work at the mill about noon and did not return in the afternoon of that day, though he had said that he could not have been at the Hester house at 5:30 p. m., the time of the homicide, because the mill did not close until 5:30 o'clock p. m. While in jail he was asked why there was blood on his handkerchief and on his overalls, and he replied that his nose had bled and he used his handkerchief. The officers found another handkerchief in his pocket with blood on it, and still another, and he gave the same explanation as to each one of them, and added that the blood from his nose had dripped on his overalls. On one of the handkerchiefs there was a spot that looked like burnt powder, and when questioned about it he stated that he had a dog and wanted him to bite, and had fed him with powder for that purpose.

There was other evidence tending, more or less, to connect the prisoner with the commission of the homicide, but it need not be stated, in the view taken of the case, except to say that when the body of Mrs. Hester

was found she was lying on her back in the room and was covered with blood, which was fresh. As Mr. Hester was coming to the house, after hearing the report of the pistol, he was shot in the head when near the house.

The jury found the prisoner guilty of murder in the first degree, and from the judgment upon the verdict he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. S. Fitts and Jones & Clement for defendant.

WALKER, J., after stating the case: It cannot be well doubted that there was ample evidence of the prisoner's guilt. The evidence, it is true, was circumstantial, but sufficiently strong for submission to the jury, and the court clearly and fully explained in its instructions the nature of such evidence and what was required to make it sufficient for a conviction. The charge was altogether favorable to the prisoner, and his rights were carefully guarded in every respect, and there is no ground upon which any objection to it can securely rest, though we will later on notice one or two exceptions taken to it.

Exceptions were entered to several rulings of the court upon evidence, and other matters, which we will consider in the order of their assignment.

1. The court permitted the witness, J. T. Thompson, to use a map of the premises where the homicide occurred, to explain and illustrate his testimony, and it was used for no other purpose, the court restricting it to that special purpose. We have often held that maps and diagrams are competent for the purpose of enabling a witness to explain his testimony, so that the jury may understand it. *S. v. Wilcox,* 138 N. C., 1120; *S. v. Rogers,* 168 N. C., 112; Wharton's Ev. in Cr. Cases, p. 1116, sec. 537a.

2. The testimony of the witness, J. W. Daniel, as to the man shooting at his dog near his home, was competent as some evidence of the prisoner's identity and of the fact that he had a pistol, and this is true when this testimony is read in connection with that of Mary Walker, who was walking behind the man who shot at the dog, and who testified that it was the prisoner, as she thought at the time. The appearance of the dog as he returned to the house was natural evidence. "The instantaneous conclusions of the mind as to appearance, condition, mental or physical state of persons, animals and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact and are admissible in evidence." *S. v.*

Leak, 156 N. C., 643; *Renn v. R. R.,* 170 N. C., 128. Within this rule, the opinion of the witness as to the appearance of the dog and his conduct was permissible.

3. The question asked the witness, J. W. Daniel, which was excluded on objection of the State, was, of course, not answered, and it did not appear what the answer would have been. It might have been unfavorable to the prisoner, in which case his objection would have failed, as he could gain nothing by such an answer and was deprived of no beneficial testimony. *McMillan v. R. R.,* 172 N. C., 853.

4. The testimony of Mary Walker as to the identity of the man she saw near J. W. Daniel's house when the pistol was fired and the dogs barked and were frightened away, was competent. She could give her impression or opinion as to who he was, from what she saw, as she knew him before. "Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it cannot be reproduced and made palpable in the concrete to the jury. Eminently is this the case with regard to noises and smells, to questions of identification, where a witness is allowed to speak as to his opinion or belief, and to the question whether a party believed himself at the time to be in great danger of death." Wharton's Ev. in Cr. Cases, sec. 459, p. 962.

5. It was competent, as corroborative of Otis Ross' testimony, to show that he had made to other persons statements similar to those he made on the witness stand, and this may be shown by his own testimony. *S. v. Rowe,* 98 N. C., 629, and cases cited; *S. v. Whitfield,* 92 N. C., 831.

6. The testimony as to the fitting of the shoe to tracks found where the prisoner had been seen was admissible, as it was a circumstance tending to show identity. *S. v. Graham,* 74 N. C., 646; *S. v. Lowry,* 170 N. C., 730. This is "real" evidence, as called by the civilians, and its value as proof is greater or less, according to the circumstances. Best on Evidence, sec. 183; *S. v. Lowry, supra.* It is some evidence tending to identify the prisoner as the perpetrator of the crime. There was sufficient proof that the tracks were those of the prisoner to warrant the admission of this evidence as to the correspondence between the tracks and the prisoner's shoes.

7. The allusion of the sheriff to the white scarf was not admitted to show that it was the one the prisoner wore around his neck when the witness, James Stanly, saw him "with something white above his coat," but as the prisoner was silent when this was said in his presence and hearing, and it was equivalent to charging that he had committed the murder, it was some evidence of the fact. He was permitted to explain it by saying that he thought they were referring to the charge of carrying a concealed weapon at Mr. Daniels' when he wore a white handker-

chief; and the judge, in commenting on this evidence, most carefully and minutely explained it to the jury, and the effect of it in the case, and told the jury that if they found that the prisoner's statement was true, and that he did not understand that the sheriff was referring to the homicide, they should utterly reject this evidence and not permit it to have any influence in making up their verdict. The prisoner's rights were thus sufficiently protected.

8. The testimony as to the prisoner having been an inmate of the reformatory was restricted to the purpose of identification of him as the man who was walking in the direction of the Hester home. One witness, Mary Walker, has testified that the man she saw was the Spencer who had been in the reformatory; and, to show who this was, it was competent to prove that the prisoner was the only man by the name of Spencer who had been confined there. It was the normal and logical way to prove the other fact.

9. This exception was taken to testimony of Mr. Craven, who was the manager of Rex Theater. The prisoner had been told by J. A. Thomas, chief of police of Winston-Salem, that they had investigated as to his whereabouts in the afternoon of the day when Mrs. Hester was killed, and discovered that he was not at the Hanes Mill at that time. The prisoner then admitted that he was not there, but left the mill about 1 o'clock and went to his home, and afterwards, the same afternoon, to Mr. Craven's theater. Mr. Craven was introduced to show that the prisoner was not at his theater, and his testimony was clearly competent for this purpose. The flat contradiction of himself was some evidence of his guilt, and the contradiction by Mr. Craven was also a circumstance to be considered by the jury. *S. v. Swink,* 19 N. C., 9; *S. v. Rowe,* 98 N. C., 629.

10. There was no element of manslaughter in the case, and the court was right in so stating to the jury. The homicide had more the appearance of a willful and deliberate murder, with no excusing, extenuating or palliating circumstance. The question was not as to the degree of the crime, but as to who was its perpetrator. The learned judge charged the jury as to murder in the second degree, and the prisoner got the full benefit of this proper instruction, but it is impossible to see in what consisted the element of manslaughter. Whoever it was fired three times at Mrs. Hester, each ball taking effect, two of them lodging in her breast, and then the husband as he approached the house, was shot down by the same person. It was not a sudden altercation, nor was there any legal provocation or any other fact or circumstance which, if found by the jury, could in law reduce the grade of the crime to manslaughter. The slayer went there to steal, or perhaps to commit some other felony, and

to kill if discovered and resisted. *S. v. Logan,* 161 N. C., 235; *S. v. Lane,* 166 N. C., 333. The burden of reducing the crime from murder in the second degree to manslaughter was upon the prisoner, and there is no evidence that would have warranted a verdict of manslaughter. We said, in *S. v. Lane, supra:* "The instruction, that if the prisoner intentionally killed the deceased with a deadly weapon, to wit, a gun, the law implied malice, and the prisoner would be guilty of murder in the second degree, is well sustained by the cases. In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree), unless he can satisfy the jury of the truth of facts which justify or excuse his act or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. This rule has been uniformly adhered to by this Court in indictments for homicide. *S. v. Quick,* 150 N. C., 820. This principle has been reiterated by us in more recent cases." *S. v. Worley,* 141 N. C., 764; *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ibid.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Cox,* 153 N. C., 638; *S. v. Fowler,* 151 N. C., 731; and formerly in *S. v. Clark,* 134 N. C., 698; *S. v. Brittain,* 89 N. C., 481. To these may be added *S. v. Davis,* 175 N. C., 723.

11. We do not think there was any misstatement of the contentions of counsel in the charge, but if there had been it should have been called to the attention of the court at the proper time, so that it might be corrected. *S. v. Blackwell,* 162 N. C., 672; *S. v. Martin,* 173 N. C., 808; *S. v. Burton,* 172 N. C., 939.

We may conclude with what was stated by *Judge Gaston* in *S. v. Swink,* 19 N. C., 9 (and reiterated in *S. v. Rowe,* 98 N. C., 629), which seems to be applicable to this case: "All the surrounding facts of a transaction may be submitted to the jury when they afford any fair presumption or inference as to the question in dispute. Upon this principle it is that the conduct of the accused at the time of the offense or after being charged with it, such as flight, the fabrication of false and contradictory statements, the concealment of the instruments of violence, the destruction or removal of proofs tending to show that an offense had been committed or to ascertain the offender, are all reviewable in evidence as circumstances connected with and throwing light upon the question of imputed guilt."

We are of opinion that the jury could fairly deduce, beyond any reasonable doubt, the guilt of the prisoner, as there was ample proof to warrant such a finding after applying most strictly, as the presiding judge did in this case, the rule as to circumstantial evidence.

The record discloses no error in the trial.

No error.

STATE v. W. A. HARRINGTON AND TOBE TILLEY.

(Filed 2 October, 1918.)

Criminal Law— Larceny—"Recent Possession"— Presumptions— Burden of Proof—Instructions—Trials.

Where there is sufficient evidence of "recent possession" of stolen property, the burden still rests upon the State to prove the defendant guilty, throughout the trial, beyond a reasonable doubt; and a charge that the defendant should be acquitted if his explanation raised a reasonable doubt nullifies the duty of the State to exclude such doubt from the minds of the jury, and deprives the defendant of his right to have them pass upon the weight and credibility of the other evidence in the case.

INDICTMENT tried before *Calvert, J.*, and a jury, at May Term, 1918, of LENOIR.

Defendants were indicted for the larceny of harness and other property. They were tried and convicted, and from the judgment upon the verdict they have appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

F. L. Sutton and Cowper, Whitaker & Hamme for defendants.

WALKER, J. We need consider but one exception, which was taken to the judge's charge, that a presumption arises from the recent possession of stolen goods. In this connection it was stated by the court that while there is this presumption, more or less strong as the possession is more or less recent, the defendants had the right to explain the fact of possession, "and if the testimony offered by them in explanation raises a reasonable doubt of their guilt, they are entitled to an acquittal." The explanation, which was that defendants had purchased the property from another, was not all of the testimony in the case tending to show the innocence of the defendants. There were other relevant facts and circumstances, which the jury had the right to consider, upon this question. It was not incumbent on the defendants to take the burden of raising a reasonable doubt as to their guilt, but there was a presumption of their innocence, and the burden was upon the State throughout the trial to exclude all such reasonable doubts. This instruction was equivalent to saying that there was a presumption of guilt from the recent possession, which prevailed, unless explained by the defendant, and that if defendants had explained it so as to raise a reasonable doubt in the minds of the jury, they were entitled to an acquittal, thereby giving full play to the recent possession as raising a presumption, if the explanation itself did not raise the necessary doubt without adverting to the other

evidence. The instruction was calculated to mislead the jury into the error that the guilt of the defendants turned upon whether the explanation was a satisfactory one, whereas it should have been made to turn upon all the evidence, that of the State and the defendants, and the sole inquiry should have been whether the State had carried successfully its proper burden and satisfied the jury, beyond a reasonable doubt, of their guilt. The charge clearly gave too much force to the fact of possession as presumptive evidence of guilt. This presumption was raised against them, as stated by the court, and substantially only one phase in favor of the defendants was presented to them in that connection, which really put the burden on them to explain the possession satisfactorily, with the consequence of guilt impliedly intimated, if they failed to do so. The rule of law which presumes innocence and places the burden upon the State to show guilt beyond a reasonable doubt was practically nullified, although it was said, generally, in another part of the charge, that such was the rule.

The instruction, though somewhat dissimilar in phraseology, is not in effect different from that given in *S. v. McRae,* 120 N. C., 608, which was held to be erroneous. As in that case, it allowed too much weight to the possession as a circumstance showing guilt. A very succinct, but at the same time a sufficiently exhaustive, discussion by *Justice Allen* as to the true nature of recent possession of stolen property as proof of guilt, will be found in *S. v. Ford,* 175 N. C., 797. He refers to the case of *S. v. Scipio Smith,* 24 N. C., 406, where *Judge Gaston* said, regarding the presumption of guilt arising from the recent possession of stolen goods: "From necessity, the law must admit, in criminal as well as civil cases, presumptive evidence; but in criminal cases it never allows to such evidence any *technical* or *artificial* operation beyond its natural tendency to produce belief under the circumstances of the case. . . . But when we examine the cases in which such a presumption has been sanctioned, or consider the grounds of reason and experience on which the presumption is clearly warranted, we shall find that it applies *only* when this possession is of a kind which manifests that the stolen goods have come to the possessor by his own act or at all events with his undoubted concurrence." The possession there was not more recent than it is in this case.

Further commenting upon our former cases concerning this question, it is said in the *Ford case:* In *S. v. Graves,* 72 N. C., 485, *Pearson, C. J.,* says that the presumption does not arise except when "the fact of guilt must be self-evident from the bare fact of stolen goods," and *Hoke, J.,* in *S. v. Anderson,* 162 N. C., 571, that it is only when "he could not have reasonably gotten possession unless he had stolen them himself." The principle is usually applied to possession which involves custody about

the person, but it is not necessarily so limited. "It may be of things elsewhere deposited, but under the control of a party. It may be in a store-room or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence." *S. v. Johnson*, 60 N. C., 237. The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent and as the other evidence tends to show it to be exclusive. *S. v. Rights*, 82 N. C., 675; *S. v. Record*, 151 N. C., 697.

It is further said, in *S. v. Ford, supra:* "The doctrine of recent possession, as applied in the trial of indictments for larceny, frequently leads to the detection of a thief, when without it the guilty would go free, but the temptation to shift evidence of guilt from one to another, and the ease with which stolen property may be left on the premises of an innocent person, make it imperative that the doctrine be kept within proper limits," citing 2 Pleas of the Crown, 289, where *Lord Hale* says of this presumption that "It must be very warily pressed."

The presumption, where it applies, being one of fact, and not conclusive of guilt, the Court should have carefully instructed the jury as to its nature and proper scope, and how they might consider it as evidence, in view of the facts of the case. The jury could not have convicted the defendants, even if they had offered no explanation of the fact that the goods were found in the stable, provided they were satisfied from the other facts and circumstances in evidence, or from the fact of the possession and its attendant circumstances, that the evidence was not strong enough to convict by excluding all reasonable doubt from their minds.

But it is sufficient to say that it was error to make a verdict of acquittal depend upon the failure of defendants to explain the possession, even by implication.

There are other errors assigned, but in view of what has been said they need not be discussed, though they may be meritorious.

New trial.

STATE v. SANDY McIVER.

(Filed 2 October, 1918.)

1. Criminal Law—Evidence—Bloodhounds.

The action of bloodhounds may be received in evidence when it is shown that they have been accustomed to pursue the human track, have been found by experience reliable in such cases, and that in the particular instance they were put on the trail of the accused and pursued and followed it under such circumstances and in such a way as to afford substantial assurance or permit a reasonable inference of identification.

2. Same—Footprints—Identification.

Evidence that trained and experienced bloodhounds had been put on the trail of the accused at the place he had been at work during the day; that they followed his tracks down the road a mile, passing other dwellings to his own, where he was found; that he protested his innocence without accusation; that the energy of the hounds then became passive or content, one of them placing its paw on overalls he admitted he had been wearing, and that there were particular marks on the bottom of the shoes of the accused which corresponded with the tracks which had been followed, both as to the markings and size and shape, is sufficient to be submitted to the jury upon the question of his guilt.

3. Appeal and Error—Evidence—Prejudicial Error—Harmless Error.

An unresponsive answer by a witness to a question, which could not have had appreciable significance on the result of the trial, will not be held reversible error on appeal.

ACTION tried before *Daniels, J.*, and a jury, at July Term, 1918, of LEE.

The indictment, under section 3334 of Revisal, charged defendant with being in the dwelling-house of Mrs. J. A. McPhail, in said county, on the night of 24 June, 1918, with intent to commit a felony or other infamous crime therein.

Verdict of guilty. Judgment, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. L. Gavin for defendant.

HOKE, J. It was chiefly objected to the validity of the trial that his Honor refused to strike out the evidence tending to show that bloodhounds had tracked the accused; and, second, his refusal to nonsuit on the entire evidence; but we are of opinion that neither position can be sustained.

It is fully recognized in this jurisdiction that the action of bloodhounds may be received in evidence when it is shown that they have been accustomed and trained to pursue the human track—have been found, by experience, reliable in such cases; and, further, that in the particular instance they were put on the trail of the guilty party and have pursued and followed it under such circumstances and in such a way as to afford substantial assurance or permit a reasonable inference of identification. Decisions in illustration of the principle and the proper limitations upon it will be found in *S. v. Wiggins*, 171 N. C., 814; *S. v. Norman*, 153 N. C., 591; *S. v. Freeman*, 146 N. C., 616; *S. v. Spivy*, 151 N. C., 676; *S. v. Hunter*, 143 N. C., 607; *S. v. Moore*, 129 N. C., 501; *Hargrave v. State*, 147 Ala., 97; *Parker v. State*, 46 Tex. Ct. App., 461; *S. v. Dickinson*, 77 Ohio State, 34. A very full and satisfactory statement of the

position will be found in this last case, as follows: "In order to make competent evidence of the conduct of bloodhounds in trailing or following the tracks of one accused of crime, it is necessary that a preliminary foundation be laid therefor, by showing by some one or more having personal knowledge of the facts that the particular dog so used had been trained and tested in trailing human beings, and by experience had been found reliable in such cases, and that the dog so trained and tested was, in the instance involved, laid on the trail, whether it was visible or invisible, at a point where the circumstances tended to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him."

And in *S. v. Freeman, supra,* speaking to this kind of evidence and its proper reception, the Court said: "Where the training, character, and conduct of the dog make his acts evidence, such acts may be either a circumstance or corroborating evidence. Their admission as evidence is not restricted to cases in which the dog's acts are corroborative only. It is sufficient if the evidence of the conduct of the dog, taken with other facts and circumstances in evidence, should be enough to authorize a verdict."

Considering the facts as they appear of record, these and other cases of like purport are in full support of his Honor's rulings. The evidence on the part of the State tended to show that on the night of 24 June Mrs. McPhail and her daughters and her little son had been sitting in the dining-room, and one of the daughters got up to go into a bedroom, the latter opening into the sitting-room and having also an opening into a screened outside porch, the latter opening into the yard; that when she entered the bedroom some one was under the bed; he jumped out and made a grab at the witness; that she eluded him and ran out in the dining-room and screamed, and the person fled. The others joined in the alarm. Soon a neighbor and others came in. That defendant lived about a mile down the road from Mrs. McPhail and had been there a short while before the occurrence, doing work on their porch; that between 1 and 2 o'clock the dogs were brought, "put on the trail under the bed," and when they came out they went out the doorway on to the screen porch, right across the yard and out into the old road; followed down the road a mile or a little over; passed several houses, and finally went up to defendant's house, and as they went up, the defendant, standing on the porch, said: "I'm not the man"; this before any statement or accusation had been made; that the dogs went into the house and up to some overalls and also a pair of low-quartered shoes that were not far away. The defendant admitted having had on the overalls that day, but said he had not had the shoes on since the Sunday before. Speaking to the kind and character of the dogs and their conduct in following the

trail, the owner who had them in charge said: "They were registered, thoroughbred bloodhounds. One he had owned three years and a half, and one a year; that they were trained to run human beings; had had a good deal of experience with them, and they were trained when he got them; that he had made from three to ten trips a month with them, and they had proved thoroughly reliable." The witness said he could not look for tracks at first, the crowd being around, but when he got away from the house 300 or 400 yards and along the trail the dogs were following, he saw tracks, examined them carefully, and they corresponded in size with the tracks of the shoes, and one of them gave indication of a hole in the center of the wearer's shoe and a peculiar wearing-off of the left heel, and both of them corresponded with the marks of defendant's shoes.

It was also shown in evidence that the shoes which defendant said he had not worn since Sunday gave every indication that they were still damp from recent wearing. There was proof also of tracks along the road, 50 yards of the house and going towards it, that corresponded in size with defendant's shoes. In reference to the conduct of the dogs in following the track, another witness, George Temple, testified, among other things, as follows:

Q. "With respect to the tracks you spoke of, coming near the house, where did the dogs trail?"

A. "They came out of the back door of the room on to the porch and 'round the house, and went to where the tracks were—trailed just as if they wanted to eat something, until they got to Sandy's house. They almost broke Mr. Cockman down, pulling him so hard. When they got to Sandy's house, they quieted right down. There were some overalls lying on the floor, and Sandy said: 'They are mine. I have been wearing them all day.' The female dog put her paw on them just as contented as if she had caught a rabbit."

Whatever misgivings may at times exist as to the admission of this kind of evidence, there would seem to be none in the present instance; and the action of the dogs, with the other facts and circumstances tending to fix the guilt upon defendant, are, in our opinion, sufficient to support his Honor's rulings and justify the verdict of the jury.

It was also objected that one of the daughters of Mrs. McPhail, in closing her evidence-in-chief, had stated that one of her sisters had been "off canvassing for War Savings Stamps, about a mile away. I think she went in the community where Sandy lives." This was a voluntary statement of the witness, not called for by any question. It had already appeared in evidence, and without objection, that the sister had been so engaged, and the statement would seem to be without appreciable significance on the results of the trial—assuredly so, in the absence of any testi-

mony tending to show that her occupation was known to defendant. In no event could it be held for reversible error. We find no error in the record, and the judgment must be affirmed.

No error.

STATE v. CHARLES JOHNSON.

(Filed 23 October, 1918.)

1. **Homicide — Deadly Weapon — Malice — Presumption — Courts— Verdict Directing—Trials.**

   Evidence that the prisoner killed the deceased with a deadly weapon, in this case, by striking him with the barrel part of a double-barreled gun, raises a presumption of malice, which he must justify by showing matters in mitigation or excuse; and an answer of acquittal on an issue as to murder in the second degree may not be directed thereon by the court.

2. **Homicide—Threats—Evidence—Trials.**

   Threats made by one accused of homicide, though uttered while under arrest, are admissible as evidence on the trial, when they were voluntarily made, or without threat, compulsion, or inducement.

3. **Same—Threats—Motive.**

   Testimony of continuous and repeated threats made by the prisoner on trials for a homicide, against the deceased, up to six months before its commission, and of a feud between them, growing out of a dispute over certain lands, of some years duration, are competent evidence as to motive, upon the trial.

4. **Same—Feud—Possession of Lands.**

   Where a feud over lands existed between the prisoner upon trial for a homicide and the deceased, a witness may testify that the prisoner was in possession of the land, upon the question of motive, such testimony not being objectionable as an expression of a legal inference.

INDICTMENT for murder, tried before *Devin, J.*, at May Term, 1918, of CUMBERLAND.

Defendant was convicted and sentenced for murder in second degree, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Sinclair & Dye and Rose & Rose for defendant.

BROWN, J. It appears in evidence that defendant, with his wife and little son, drove out to a tract of land belonging to him, to gather wood and straw. In the wagon he carried an unloaded shotgun. Defendant

met his brother, who had an axe in his hands, apparently drawn on defendant, who went to his wagon and took out the shotgun. There was an altercation, in which defendant struck the deceased, John Henry Johnson, on the head with the gun barrel, from which blow he died shortly after.

1. The motion of defendant to direct a verdict for defendant was properly overruled.

The defendant admitted that he had an altercation with deceased, in which he hit deceased in the head with the barrel of a double-barreled shotgun (unquestionably a deadly weapon, even when used in that manner) and killed him.

It is true there is much evidence upon part of defendant that deceased was attacking him with a drawn axe, and that he struck in self-defense, but it is well settled in this State that when the killing with a deadly weapon is proven or admitted, the burden of proof shifts to the defendant, and he must justify the homicide by satisfying the jury as to any matters of mitigation or excuse. If he fails to so satisfy the jury, they should convict him of murder in second degree, as the law implies malice from the use of the deadly weapon. *S. v. Brittain,* 89 N. C., 481; *S. v. Davis,* 175 N. C., 728.

Applying this established rule, the court could not direct a verdict for defendant, as he was tried only for murder in second degree, and not for the capital felony. The misfortune of defendant is that the jury seems not to have credited his version of the affair.

The remaining assignments of error are directed to matters of evidence.

2. The declarations of defendant while under arrest were properly admitted.

There is nothing in the record indicating that the declarations admitted were induced by threats or any kind of compulsion or inducement. They appear to have been entirely voluntary upon part of defendant. The fact that he was in custody of an officer does not alone render them incompetent. *S. v. Bowden,* 175 N. C., 794.

3. The defendant objected to evidence of threats against deceased, made by defendant at various dates, varying from six months to two years before the killing.

We might hesitate to admit evidence of threats to kill the deceased, made two years before the homicide, if they stood alone, without evidence of intermediate and recurring threats, although threats made twelve months prior were admitted in *S. v. Howard,* 82 N. C., 624, without evidence of continuing threats. In this case there is evidence of continuing and repeated threats up to six months before the homicide, as well as evidence of a standing feud of some years duration between the

deceased and defendant, growing out of a dispute over certain land.

Under such circumstances, we think the evidence was properly admitted. 6 Ency. of Evidence, 631.

4. The following evidence was excepted to:

Q. "Who was in possession of the two tracts of land, or who claimed them?" A. "John Henry Johnson was in possession of some on either side."

It was competent to prove the facts concerning the dispute as to the possession and ownership of the land to show motive for the homicide. This method of proving possession has been sustained by this Court in a learned opinion by *Justice Shepherd* in *Bryan v. Spivey,* 109 N. C., 67, and the very question asked on this trial approved.

As said by the learned Assistant Attorney-General in his argument: "Possession is a collective fact, the result of the witness' observation and knowledge, and is not really an expression of opinion. Testimony such as this is admissible, with its weight in a particular case to be tested by cross-examination."

The law is very clearly expressed in *Rand v. Freeman,* 1 Allen, 517: "A witness was asked, 'Did you take possession of the property?' The question was objected to, as incompetent to prove possession. The court said, 'It is objected that the question was illegal, because possession consists partly of law and partly of fact. But it is a sufficient answer to this to say that the word is often used merely in reference to the fact, and the defendant could have protected himself from all prejudice by cross-examination.' "

We have examined the remaining exceptions to evidence, and think they are without merit and need not be discussed.

No error.

STATE v. STARKIE FULCHER.

(Filed 23 October, 1918.)

1. **Seduction—Promise of Marriage—Evidence—Supporting—Good Character—Virtue—Statutes.**

On the trial of an indictment for seduction under promise of marriage, the innocence and virtue of the prosecutrix, as testified to by her, may be sufficiently supported by evidence of her previous good character.

2. **Seduction— Promise of Marriage— Sexual Act— Paternity — Evidence— Statutes.**

Where there is evidence that the defendant, indicted for seduction under promise of marriage, had frequently and almost exclusively gone with the prosecutrix at and before the time of conception, had admitted an engage-

ment of marriage to her mother, and had refused a request to visit her when the consequences had developed, together with the birth of the child, it is sufficiently supporting, under the statute, of her direct testimony of the sexual act and the paternity of the child for the determination of the jury.

3. Seduction—Promise of Marriage—Promise—Evidence—Statute.

Upon the trial for seduction under promise of marriage, testimony that the defendant admitted to others the promise of marriage; that he paid assiduous and almost exclusive attention to the prosecutrix at the time she alleges the act was committed by them, with the other relevant circumstances of this case, is held sufficient, under the statute, as supporting evidence of her direct testimony that he had promised to marry her and that she had thereby been persuaded to yield to him.

4. Seduction—Promise of Marriage—Time of Promise—Evidence—Instructions.

The promise to support an indictment for seduction, under the statute, must have preceded the illicit intercourse, and in this case it is *Held* that the judge's charge, under the evidence, properly so confined it.

5. Seduction—Promise of Marriage—Corroborative Evidence.

Testimony of the mother as to what the prosecutrix said of the defendant's promise of marriage is corroborative evidence in an action for seduction, under the statute, though not supporting in the proper sense of the word.

INDICTMENT tried before *Daniels, J.*, and a jury, at June Term, 1918, of VANCE.

Defendant was indicted for the seduction of Myrtle West under promise of marriage. She testified that the defendant, in July, 1917, had promised to marry her; that he had visited her frequently since the April before, and was accepted as her lover, and that in consequence of his promise to marry her she had yielded to his embraces and had committed the sexual act with him several times. She did so every time he came to see her, because he had often professed love for her, and she loved him, and especially because of his promise to marry her. He had not only promised to marry her, but "swore" that he had procured a license for the purpose, and thereby persuaded her to submit to his solicitation.

There was ample evidence of her good character prior to the time she yielded to him, and she testified that "she had never had sexual intercourse with any other man than Starkie Fulcher." The doctor told Mrs. West, her mother, of her pregnancy just before the birth of her child, which was in March, 1918. In the summer of 1917, and in September and October of the same year, she told her mother that Fulcher was "talking love to her" and had promised to marry her in October, 1917, but they were not married. The prosecutrix further testified: "I am 17

years old and have known the defendant since the last Sunday in March, 1917, when he came to see me with his brother. He began coming to see me right off, and was soon coming one, two, and three times a week, going with me to church and about the neighborhood. He began talking love to me in April, the second or third time he came, and kept this up until September; said he loved me better than any one in the world. I had baby last March. Defendant was the father. It died soon after. The reason I let him have to do with me was, he told me he loved me. I thought he loved me, and I loved him. I thought he would do what he said. I never yielded till he told me he had the license to marry me. He said he would marry me, and had got license and given it to Mr. Walters. He appointed second Sunday in October for the marriage, and then Christmas. He told mother he had promised to marry me, and she bought clothes for it." She was corroborated by her mother and father as to buying the clothes for her, and by her father as to the frequent visits of defendant to her in 1917. Her father testified that other men came to see her—the Curries, Parrish, Abbott, and others; and it also was in evidence that one Will Thompson came to see her, and that her father ordered him from the house when he found him with her one night. He ran out so hurriedly that he left his cap behind, and never came back for it. The night Dr. Gill was there, the defendant was sent for, but did not come to the house. There was other evidence, *pro* and *con*, which need not be stated.

Defendant was convicted, and appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. C. Kittrell and Thomas M. Pittman for defendant.

WALKER, J., after stating the case: The defendant's motion to nonsuit was properly overruled, as there was evidence for the jury as to the innocence and virtue of the woman, as to the seduction, and as to the promise inducing it.

1. As to her innocence and virtue, the evidence of her uniformly good character before her fall was properly received, according to our precedents, as some evidence supporting her direct and positive testimony that she committed her first sexual act with the defendant and "had never had sexual intercourse with any other man." Taking all of the evidence into consideration, both positive and circumstantial, as to her virtue and innocence, we hold it to be sufficient. *S. v. Horton*, 100 N. C., 443; *S. v. Mallonee*, 154 N. C., 200; *S. v. Pace*, 159 N. C., 462; *S. v. Cline*, 170 N. C., 751.

2. As to the sexual act. Her testimony was sustained by the birth of

the child, and, as to the identity of her betrayer, by his frequent visits to her home, and especially at the time of the conception, and his general conduct and demeanor towards her, his admission to her mother of their engagement to be married, and his refusal to answer the invitation to her home when he was asked to come. It may be fairly and reasonably inferred that, when a man is with the prosecutrix so frequently as this defendant was, to the exclusion of others, if one phase of the evidence be true, he was the author of her ruin. It is a matter for the jury. They must find the fact whether he was there at the time, and in order to do so, they may consider all of the circumstances and surroundings, if there is any evidence of a supporting character, as there is in this case. *S. v. Mallonee, supra; S. v. Moody,* 172 N. C., 967.

3. As to the seduction by reason of the promise, the defendant admitted the engagement to other witnesses, and his assiduous attentions to the girl at the time when she alleged they committed the act, with other circumstances already related, tended to support her testimony that he had promised to marry her, and she was thereby persuaded, after hesitation, to yield to his wishes. The woman could not easily be supported in any other way, for the man is not apt to admit his own guilt, though there are witnesses of it. *S. v. Pace, supra; S. v. Shirley,* 141 N. C., 823; *S. v. Kincaid,* 142 N. C., 657; *S. v. Moody,* 172 N. C., 967.

It is said in Underhill on Cr. Evidence, sec. 388: "The conduct and relations of the parties after, as well as before, the date of the alleged seduction may be shown, such evidence being relevant to prove that consent was obtained by promise and inducements, and of what they consisted." This is cited with approval in *S. v. Moody,* 172 N. C., at 971, where we also said, quoting from the courts of other States having similar statutes: "In *S. v. Curran,* 51 Iowa, 112, 118, the Court, referring to this question, held: 'The evidence relied upon as corroborative is that the defendant was the prosecutrix's suitor through a long period of time. Such fact, considered independently, would be entirely consistent with the defendant's innocence. He claims, therefore, that it does not tend to connect him with the offense. In our opinion, the position is not well taken.' In *Stevenson v. Belknap,* 6 Iowa, 97 (103), the Court said: 'We believe that all authorities concur that seduction is generally made out by a train of circumstances, among which may be enumerated courtship, or continued attention for a length of time.' See, also, *S. v. Wells,* 48 Iowa, 671. Courtship affords not simply the opportunity, but the very means of persuasion by which seduction is effected. The testimony of the prosecutrix is competent though not sufficient evidence that the defendant was her seducer. The fact that he was her suitor, proven otherwise than by her own testimony, tends to make credible her testimony that her proven seduction was effected by him. The corrobora-

tion, while by no means conclusive, must impress every one who has any knowledge of human nature as exceedingly cogent.' (See, also, McClean Cr. Law, sec. 1119). But evidence of this character should not be considered as supporting unless the relations and the conduct and demeanor of the parties toward each other are such as to indicate that the man is the accepted lover of the woman, and the jury must find the fact whether upon such evidence as supporting that of the prosecutrix the promise of marriage was given and induced the seduction." The Court said, in *S. v. Timmons*, 4 Minn., 241, 247: "It cannot be intended that by being corroborated the statute means that there shall be proof of these facts sufficient in itself to establish them independently of the testimony of the girl, as that would render the statute practically null. Parties seldom seek publicity in such matters. From their nature they transpire in secret, and it is only by accident that any positive proof can ever be brought to bear upon them, except through the parties themselves. The corroboration, therefore, intended by the statute is proof of those circumstances which usually form the concomitants of the main fact sought to be established, which circumstances should be sufficiently strong in themselves and pertinent in their bearing upon the case, to satisfy the jury of the truthfulness of the witness in her testimony on the principal facts." It is held in *S. v. Reinheimer*, 109 Iowa, 624, that in a prosecution for seduction the fact that the parties kept company and acted as lovers usually do, and other like circumstances, are sufficient confirmation and support of the evidence of the prosecutrix required by the statute. With reference to facts somewhat similar to those in this case, the Court said, in *S. v. Hill*, 91 Mo., 423: "The prosecuting witness swears positively to a marriage promise made by defendant on the night they were in the kitchen; and we think the foregoing evidence is sufficient by way of corroborating circumstances. It is true, the visits of defendant were not frequent, and this evidence may all be true, and there have been no promise made to marry the girl, but the circumstances are such as usually attend such engagements. Whether they and the testimony of the prosecuting witness outweighed the positive denial of the defendant was a question for the jury to determine." And in *S. v. Whatley*, 144 Ala., 68: "It was proper to permit the State to show how long the defendant kept company with the witness. He was charged with having seduced her upon a promise of marriage, and their relationship and conduct toward each other was a proper element for the consideration of the jury." But the case of *Armstrong v. People*, 70 N. Y., 38, 44, bears more directly and fully on this question we are discussing, and there the Court held: "It is settled by the authorities already cited by the Court that the supporting evidence need be such only as the character of these matters admits of being furnished. The promise of marriage is not an agreement usually

made in the presence or with the knowledge of third persons. Hence the supporting evidence possible in most cases is the subsequent admission or declaration of the party making it, or the circumstances which usually accompany the existence of an engagement of marriage, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her sex, and all those facts of behavior towards her which before parties to an action were admitted as witnesses in it were given to a jury as proper matter for their consideration on that issue. So, too, the act of illicit connection, and the immediate persuasions and inducements which led to compliance, may not be proved by the evidence of third persons directly to that fact. They are to be inferred from the facts; that the man had the opportunities, more or less frequent and continued, of making the advances and the propositions, and that the relation of the parties were such as that there was likely to be that confidence on the part of the woman in the asseverations of devotion on the part of the man, and that affection toward him personally which would overcome the reluctance on her part, so long instilled as to have become natural to surrender her chastity. Circumstances of this kind vary in weight in different cases, and it is for the jury to determine their strength. But when proof is made of the existence of them, in some degree, it cannot be said that there is no supporting evidence. A court cannot then properly direct a verdict or discharge the defendant in the indictment, on the ground that no case is made for the consideration of the jury." These cases were cited in *S. v. Moody, supra,* and others will be found there which held the same way, and the case itself (*S. v. Moody*) is an authority in support of our views.

The defendant contends that the supporting testimony should relate to a time preceding the illicit intercourse. We think that this position, and others taken by the defendant, so far as they are correct in law, are fully covered by the charge of the court, which was as follows: "It is in evidence that the prosecuting witness told her mother in October that she would be married to defendant on the second Sunday in October, and this may be considered as corroborative testimony, but not as supporting testimony, upon the question of the promise of marriage at the time of the alleged intercourse. There is testimony that the defendant continuously, from April through the summer and fall, visited the prosecutrix one, two, and three times a week; went with her to church and Sunday school, visited with her in the neighborhood, and that no other young man was keeping her company during that time. If you believe the testimony you may consider it as supporting testimony of the existence of the promise of marriage at the time of the alleged intercourse." The judge was not bound to adopt the language of the requests for instruc-

tions, but might use his own, provided it did not change the sense or weaken their force. *Marcom v. R. R.*, 165 N. C., 25.

What the prosecutrix said to her mother in regard to the promise of marriage was corroborative evidence, though not supporting in the proper sense of the word. *S. v. Cline*, supra and cases cited.

We are of the opinion that there is sufficient supporting testimony, though it may not be very strong or of any great probative force. It may even be characterized as slight or weak, but it is sufficient for the jury, being more than a mere scintilla.

We do not find, upon careful examination, that the record discloses any substantial error in the trial of the case.

No error.

STATE v. SAM CARROLL.

(Filed 6 November, 1918.)

1. Appeal and Error—Jurors—Challenge—Prejudicial Error.

Where exception is taken to the permission of the court allowing a party to the action to challenge a juror after he had passed him, the objecting party must show that he had exhausted his challenges or had in some way been prejudiced, in order that reversible error may appear on his appeal.

2. Appeal and Error—Evidence—Unanswered Questions.

On appeal from the exclusion of an answer to a question, the character of the evidence excluded must appear, so the court may see and determine whether prejudicial error had therein been committed.

APPEAL by defendant from *Shaw, J.*, at May Term, 1918, of ROCKINGHAM.

This is an indictment for manufacturing intoxicating liquors, and from the judgment pronounced upon a conviction the defendant appealed, assigning the following errors:

1. To the action of his Honor in permitting the State to stand aside the juror, J. M. Roberts.

2. To the action of his Honor in refusing to allow the witness, Ziglar, to continue his answer to the following question:

Q. You didn't know whether that still slop was Mr. Carroll's or the man that run the still? A. I don't know. Mr. Carroll said—

3. To refusing defendant's motion for nonsuit at the close of State's evidence.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Sharp and C. O. McMichael for defendant.

ALLEN, J. 1. The State was permitted to challenge the juror, Roberts, after the jury had been passed by the State, and before acceptance by the defendant, and there is nothing in the record to show that this was in any way prejudicial to the defendant. It does not appear that the peremptory challenges were exhausted, or that the jury finally empaneled was not entirely satisfactory to the defendant.

As said in *Ives v. R. R.,* 142 N. C., 131, "The defendant is not in a position to except to the ruling of the court sustaining the objection to the juror. It had not exhausted its peremptory challenges, and, so far as appears, the jury chosen to try the case constituted a panel entirely acceptable to both parties. The purposes of justice and the ends of the law are equally attained when a fair and impartial trial has been secured to the complaining party. The right of challenge confers not a right to select, but a right only to reject. This is so in theory and it should be so in practice. *S. v. Gooch,* 94 N. C., 987; *S. v. Hensley,* 94 N. C., 1021; *S. v. Jones,* 97 N. C., 469; *S. v. Freeman,* 100 N. C., 429; *S. v. Pritchett,* 106 N. C., 667; *S. v. Brogden,* 111 N. C., 656; *S. v. McDowell,* 123 N. C., 764. If an unobjectionable jury was secured, how does it concern the defendant that a juror was improperly rejected, if such was the case, which we need not decide? The question in the form here presented was decided against the defendant's contention in *S. v. Arthur,* 13 N. C., 217."

2. The second assignment of error cannot be sustained, because there is nothing to indicate the nature of the evidence excluded.

If, however, the declaration of the defendant was unfavorable to him, he is not hurt by its exclusion; and if in his favor, it would be condemned as self-serving.

3. We have carefully examined the evidence, and are of opinion the circumstances are sufficient to sustain a conviction.

No error.

STATE v. PERRY COOKE.

(Filed 6 November, 1918.)

Seduction — Promise of Marriage — Prosecutrix — Supporting Evidence — Statutes—Criminal Law.

Upon a trial for seduction under a promise of marriage, the direct testimony of the prosecutrix is sufficiently supported by other testimony which tends to show the previous good character of the prosecutrix; that she

and defendant went continuously together, as engaged people, for two years; that she told her father and mother of the promise and of her love for the prisoner when her condition was first discovered, and that the child was born nine months after the prisoner's purpose was accomplished; and a motion to nonsuit was properly denied. Revisal sec. 3354.

WALKER, J., concurring with opinion; HOKE, J., concurring in result; ALLEN, J., dissenting; BROWN, J., concurring in the dissenting opinion of ALLEN, J.

APPEAL by defendant from *Calvert, J.*, at May Term, 1918, of FRANKLIN.

The defendant was indicted and convicted for seduction under promise of marriage, and appealed.

Attorney-General Manning, Assistant Attorney-General Nash, W. H. Yarborough, and Ben T. Holden for the State.

W. M. Person and T. T. Hicks for defendant.

CLARK, C. J. The defendant has twice been convicted by the unanimous verdict of a jury—twenty-four men, each of whom found that the defendant was guilty beyond a reasonable doubt, and the judge on both occasions held that there was sufficient evidence in support of the woman's testimony to submit the case to the jury. This Court is now asked by the defendant to adjudge whether there was supporting evidence when it has convinced two juries who heard it, saw the demeanor of the witnesses upon the stand, and who by the Constitution were charged with finding the facts. The judge set aside the verdict of the first jury, but it was stated on the argument, and not controverted, that this was not upon the ground of any doubt of the correctness of the verdict, but because, after verdict, the defendant raised the technical point that one of the jurors was related to the prosecutrix. This did not require the judge to set aside the verdict, but was a matter resting entirely in his discretion. *S. v. Maultsby*, 130 N. C., 664, and cases there cited and citations thereto in the Anno. Ed.

Reviewing this testimony, the presiding judge properly submitted it to the jury.

The prosecuting witness testified that she and the defendant "became engaged in the fall of 1916," and that at Christmas "he had promised to marry me, and I thought he would keep his word; so I yielded to him." She testified that he began to visit her in the summer of 1915 and continued to do so till April or May, 1917, when he ceased coming; that during this time he would come to see her, and she would sometimes meet him at church and he would take her home; that she had other beaux, but was never engaged to any of them, nor was there any improper conduct with them. Four witnesses on the part of the State and

three on the part of the defendant testified to the good character of the prosecutrix, and there was no testimony to the contrary. The child was born in September, 1917. The above was testimony in support, even if there was nothing more, though in this case there was. In *S. v. Horton,* 100 N. C., 448, the Court says: "The virtuous character and conduct of the prosecutrix was proved and conceded; so the testimony of the injured girl was not 'unsupported,' but derived confirmation from that of others as the statute prescribed."

In *S. v. Malone,* 154 N. C., 202, the Court says: "The prosecutrix testified to the promise of marriage, the seduction, and innocence and virtue. A child was born to her and was 18 months old at the time of the trial. There was evidence tending to show that prior to her alleged seduction by the defendant she had always been a woman of good character and led a blameless life, and that as a school girl she had borne a good reputation with her teacher and schoolmates. This *was sufficient to constitute supporting testimony* within the meaning and requirement of the statute."

These two cases are exactly in point, and if there had been no other evidence, amply sustain the action of the judge and of the two juries.

But there is other supporting testimony in this record of the promise of marriage: For nearly two years the defendant was going with the prosecutrix from the summer of 1915 to April or May, 1917. She testifies to this and is supported by the testimony of her mother, of her father and of the defendant himself. This was held sufficient in *S. v. Moody,* 172 N. C., 967, in which *Walker, J.,* speaking for a unanimous Court and citing several cases, held as set out in the headnote:

"Criminal Law—Seduction—Trials—Supporting Evidence—Statutes. Upon trial under an indictment for seduction under a breach of promise of marriage (Revisal, sec. 3354), requiring supporting evidence to make that of the prosecutrix competent upon the three elements of the crime, it is not necessary that the supporting evidence be sufficient, as substantive evidence, for conviction; and where the good character of the prosecutrix before the act has been testified to by other witnesses, the act itself admitted, and there is testimony that the defendant had paid the prosecutrix exclusive and assiduous attention for years under circumstances evidencing that he was her accepted lover, her testimony as to the promise of marriage is sufficiently supported by the testimony of others to be competent within the meaning of the statute." This case has been approved and followed in *S. v. Fulcher, ante,* 724.

It is not within the province of this Court to review and weigh the testimony and determine what the verdict should have been; that was a matter for the jury, subject to the revising power of the trial judge if he deemed the verdict against the weight of the testimony, which he did

not. The only power committed to this Court is to say whether there was any testimony in "support" of the woman's testimony, and the above cited cases hold that the circumstances above recited, and which appeared in this case, were sufficient to be "supporting testimony." It must be remembered that this offense is always committed in secret, and the testimony "in support" is not required to be by an eye-witness.

But there was further corroborating testimony in this case. There was evidence in this case by the father and mother that when her condition was first discovered the prosecuting witness told them that she and the defendant had been engaged, and that the defendant was the father of her child. In *S. v. Whitley,* 141 N. C., 823, the defendant excepted that the mother of the prosecutrix was allowed to testify, as here, that after she discovered her daughter's condition the daughter told her that the defendant had promised to marry her and she loved him. The Court (at p. 825) said: "The statements made by the prosecutrix to her mother were competent to corroborate her testimony on the trial."

In *S. v. Kincaid,* 142 N. C., 657, similar statements were admitted as corroboratory evidence. Again, it is said in *S. v. Pace,* 159 N. C., 464: "It is well settled that statements to others that the prosecutrix and the defendants were going to be married are competent for the purpose of corroborating the testimony of the prosecutrix that defendant had offered and promised to marry her."

There was further evidence that on Christmas day, 1916, after their engagement, the defendant came to her home and took her in his buggy to Mrs. Tharrington's to spend the night, and the next day to Mr. Carter's, and they were there several days. This was evidence tending to corroborate the engagement which she testified to as then existing, and neither Mr. or Mrs. Tharrington nor Mr. Carter was called to contradict this significant testimony. It is a most pregnant fact in corroboration that the child was born exactly nine months afterwards.

Upon the above authorities, there was abundant evidence to carry the case to the jury of the vicinage, who, knowing the witnesses and the credit which should be given their testimony, and having the opportunity to observe their conduct and bearing on the stand, and other pointers to the truth (which cannot appear in the dry transcript of the record to this Court), have acted within the authority confided to them by the Constitution, and upon their oaths have twice said that beyond a reasonable doubt on the part of any of the twenty-four, against none of whom the defendant urged any objection, that he was guilty beyond a reasonable doubt. To require more evidence in a case of this kind would be practically to repeal the statute. There is no reason why the require-

ment in the statute should in this case extend beyond what the Court has heretofore held.

There is no crime more despicable than this. It is committed in secret, by lust and lying, by deception and the stronger taking advantage of the weaker. Yet, under the influence of mediæval ideas, it was not made a crime in this State till the act of 1885. The proviso that the testimony of the woman should not be sufficient to convict unless supported was not, however, intended to "throw the monkey-wrench into the machinery" and prevent the *possibility* of conviction. Prior to that time, the only remedy was by a civil action, with the humiliating requirement, under the common law, that it should be brought by the father, alleging the loss of the services of his daughter as his servant. But even then the common law did not disparage the testimony of the daughter as unworthy of belief unless "supported."

Upon the statute as written, and upon the precedents, there was not only evidence in support, but as much as can ordinarily be offered as to an offense of this kind, committed in secrecy. There was unqualified evidence of the promise of marriage, though in *S. v. Ring,* 142 N. C., 596, it was held that it was sufficient if this could be reasonably inferred from the evidence; there was evidence of the good character of the girl, which was held sufficient supporting testimony in *S. v. Horton,* 100 N. C., 448, and *S. v. Malonee,* 154 N. C., 202; there was evidence that she told her mother and father of the engagement and the conduct of the defendant, which was held sufficient as supporting testimony in *S. v. Moody,* 172 N. C., 967, and numerous cases there cited by *Walker, J.,* from this and other States. The testimony of the mother that the daughter told her of her engagement and of the conduct of the defendant was also held sufficient in *S. v. Whitley,* 141 N. C., 823, and *S. v. Kincaid,* 142 N. C., 823. There was also evidence of the continuous courtship for two years, and of their visiting together at the houses of friends and relatives at Christmas, 1916, for several days, and the further striking fact that the child was born 25 September, 1917, exactly nine months later.

The act of 1913, ch. 73, provides that if on this motion the judgment of nonsuit is allowed on appeal, "It shall, in all cases, have the force and effect of a verdict of not guilty." This is not, therefore, the case of a new trial for some error of the judge, but is a verdict by the court of not guilty, which theretofore was without precedent. But the statute certainly did not intend that this Court should weigh the evidence and render a verdict.

As to a similar statute in civil cases (chapter 109, Laws 1897), we said, in *Willis v. R. R.,* 122 N. C., 908: "The act was not intended to deprive parties of the right to trial by jury when there is any evidence."

This has been often cited since. (See Anno. Ed.). The rule that, on motions for a nonsuit, the evidence must be taken in the light most favorable for the State or plaintiff, and with all the reasonable inferences that can be drawn from it, is more than ever essential if we are to preserve the constitutional principle that the facts are to be found by a jury, and not by the court.

As to the offense here charged, it is true, the statute forbids the jury to believe the witness for the State, even though as a matter of fact they do believe her testimony, unless she is "supported." "The statutes does not specify how much or in what way she shall be supported, but simply that she shall be supported" (*Brown, J.*, in *S. v. Pace,* 159 N. C., 462), and no case has ever held insufficient such evidence as this.

This *discrimination against the woman* is the only instance now in our statutes where a whole class is branded by the statute as unworthy of belief, unless there is testimony to support them. As to treason, owing to the fearful penalties formerly of being drawn to the place of execution, disemboweled, and the head, after execution, being exposed, and other barbarous penalties, the law did require two witnesses, but this did not ban any particular class of witnesses, and the defendant at that time was not allowed to testify in his own behalf. As to perjury, it has been held that something more than one witness is necessary, because it was oath against oath. But in neither of these cases was the requirement discounting the testimony of the witness a disqualification to one class of people only. Besides, in North Carolina there have been no trials for treason since we entered the Union, in 1789.

On the other hand, there are offenses as to which the law, instead of disparaging the testimony for the State, provides that when a certain state of facts is shown, there is a *prima facie* evidence of guilt, as, for instance, that when killing with a deadly weapon is shown, the law presumes malice, and the offense is murder, unless the defendant shall prove matter in defense or litigation. In indictments for larceny, the recent possession of stolen goods raises a presumption of guilt, and the same is true as to possession of intoxicating liquors, and there are other cases in which the requirement of proving the defendant guilty beyond a reasonable doubt is met by a presumption of guilt on proof of a given state of facts.

In addition to the statute on its face being a discrimination against the testimony of women, the woman in such cases is under the greatest possible disadvantage by reason of her shame and confusion, unaccustomed to proceedings in the courthouse, frightened and burdened with an offense which her associates and society will never condone, and she is burdened further by this requirement, not only that she must prove her deceiver guilty beyond a reasonable doubt, but by the further requirement that she must be "supported."

There was a time when Jews were disqualified as witnesses, or disparaged by additional testimony being required; till a later date, slaves were incompetent as witnesses; and still more recently, defendants in all criminal actions, and parties or those interested in civil actions were disqualified to testify. All these restrictions (with an exception in civil actions only as to transactions when the other party is dead) wiser legislation has swept away, and the credit to be given to the testimony of a witness is for the jury to determine. Minors are not disqualified or legally disparaged as witnesses, if found of sufficient intelligence. A defendant in a criminal action is always competent now to testify in his own behalf. The sole restriction as to criminal actions now remaining in our statutes is this disparagement and discrimination against the credit the jury shall give to the testimony of the woman in an indictment of this kind, whom the jury is forbidden to believe (even though in fact they may believe her), unless supported by other evidence.

Meanwhile, the other party to a transaction of this kind is not only competent, and the jury is left free to believe him without disparagement, but his testimony is enhanced and bulwarked by the usual rule in criminal actions, that the jury cannot find against him unless "beyond a reasonable doubt" they find his testimony to be untrue when, as in this case, he goes upon the witness stand.

But when even with that disparagement the testimony of the prosecuting witness has been held true beyond a reasonable doubt by two juries, and the judge has twice held the evidence sufficient and supported, an appellate court should be very slow to find the defendant "not guilty." On such motion, the evidence must be taken in the most favorable light for the State. *S. v. Carlson,* 171 N. C., 818.

No error.

WALKER, J., concurring: It will be found by reference to *S. v. Malonee,* 154 N. C., 202, that the quotation from it in the opinion of the Court in this case, was taken from a context which was restricted solely to the innocence and virtue of the woman, and did not extend to the seduction or promise of marriage, which were considered afterwards, and we held merely that her general good reputation or character was "supporting" testimony as to such innocence and virtue; and in *Moody's case* we said that the woman's testimony was not sufficient to convict unless supported in the essential particulars, and not that its competency depended upon its being supported. My opinion is, that in this case there is supporting testimony as to all three essentials. With this understanding of those decisions, I agree to the conclusion of the Court that there was no error in the trial of the case.

ALLEN, J., dissenting: The statute under which the defendant is indicted has a twofold purpose—one, to protect the innocent and virtuous woman; and the other, to guard the man from an unfounded charge, made by the woman in her extremity; and it is therefore provided "That any man who shall seduce an innocent and virtuous women under promise of marriage shall be guilty of a crime," but that "The unsupported testimony of the woman shall not be sufficient to convict." Rev., sec. 3354.

In the construction of the statute, it has been uniformly held that the essential elements in the crime are: (1) The woman must be innocent and virtuous—that is, that she has not previously had illicit intercourse with any man. (2) A promise of marriage. (3) An act of sexual intercourse, induced by the promise, and not by the lustful passions of the prosecutrix, and that "It is not sufficient that the prosecutrix shall be corroborated, but she must be supported by independent facts and circumstances" as to each element of the offense. "There must be some independent evidence or circumstance, and it must be independent of and other than that of the prosecutrix." *S. v. Ferguson*, 107 N. C., 850. This supporting evidence may consist of evidence of good character, which supports the allegation that the prosecutrix is innocent and virtuous and that she yielded her person because of the promise of marriage, if the promise has been otherwise proven, admissions of the defendant, association with the prosecutrix, and attentions such as usually exist between engaged couples, and other relevant circumstances. *S. v. Malonee*, 154 N. C., 202; *S. v. Moody*, 172 N. C., 970.

Applying these principles, I am of opinion that there is no supporting evidence as to the promise of marriage, and slight, if any, as to the act of intercourse or that the prosecutrix yielded her person because of the promise. The only evidence of this character relates to the visits and attentions of the defendant, and as to these the prosecutrix testified: "Defendant and I became acquainted in the summer of 1915. He came to see me occasionally, and I met him at church sometimes and he would take me home. I live with my father, 6 miles northeast of Louisburg. I can't say how often he came. In the fall of 1916 we became engaged. On Christmas day, 1916, he came to my home and took me in his buggy and carried me to Mrs. Tharrington's to spend the night, to take her and me the next day to Mr. Carter's, near Youngsville. On the way to Mr. Tharrington's that Christmas day he solicited me to have intercourse with him. He had promised to marry me, and I thought he would keep his word, and I yielded to him. We spent the night at Mr. Tharrington's and went to Carter's, and came back Thursday, and at my home Thursday afternoon, in the big room, near the window, he had intercourse with me again. I never received any letters from the defendant

nor wrote him any. I did receive a note or two from him that he would call. Haven't got them now. I don't remember saying at the justice of the peace trial that I had never written or received a line from defendant. I never told either one of my parents nor any one else that defendant had promised to marry me or that he and I were engaged, until I told it on the witness stand when this case was on trial before the magistrate, 26 May, 1917. The warrant was issued 24 May, 1917. The reason I yielded to defendant was because he told me if anything got the matter with me he would give me medicine to destroy it, or marry me. We were in the buggy, and stopped on the side of the road, near the cross-roads, not far from Mount Gilead Church. I was sitting on the buggy seat when the act was committed. We were standing up when it was committed the second time, the next Thursday. It was in my father's house. There were six or seven children there, and my parents and some company. We were standing near the window, but the shade was down. The act was not repeated, because I did not want to. I never had sexual intercourse with Jim Finch, or Earle Wolfe, nor with Ira Cash, nor with Hugh Hayes, nor any other man, except defendant. My baby is a girl."

The mother of prosecutrix testified: "That defendant visited her daughter from about 1915 till spring of 1917, once a month or so, and sometimes oftener, and stopped coming about April or May, 1917; that she did not believe or suspect that they were courting or engaged until her daughter told her so at the time she confessed her pregnancy."

The father of prosecutrix testified: "Defendant visited my daughter, Belle, two or three years and hauled her around. Nothing was ever said by him or her to me, or by me to either of them, about their being engaged."

This does no more than show occasional visits and attentions of such character that they did not cause the mother to "suspect they were courting or engaged," and falls far short of the conduct of the lover, who usually endeavors to appropriate all of the time of his sweetheart.

The prosecutrix also testified that several young men visited her, and that she walked home with one of them, Earle Wolfe, from church, a distance of 2 miles, on the day she alleges the defendant first had intercourse with her. The conversation of the prosecutrix with her mother after her pregnancy was discovered when she for the first time told of her engagement is corroborative—not supporting—evidence.

The evidence required by the statute, in addition to the evidence of the prosecutrix, as to the act of intercourse, is meager, if there is any.

The birth of the child on 25 September, 1917, is evidence of intercourse on 25 December, 1916, with some one, but not that the defendant was the person; and if it be said the defendant had the opportunity, as

he rode with the prosecutrix on Christmas day, so did Earle Wolfe, who walked with her in the country 2 miles on the same day and who was reported in the neighborhood to be engaged to the prosecutrix, was subpœnaed as a witness for the prosecutrix before the justice, but was not examined, and who has since left the neighborhood.

The child, a girl, was exhibited before the jury, but no witness either expressed the opinion that she was like the defendant or pointed to a single mark of resemblance, and on the contrary the prosecutrix, speaking of the only feature referred to by any witness, said the child "has black eyes; so have I; defendant's eyes are gray." The defendant, who proved a good character, denied the promise of marriage and the intercourse. The evidence that the prosecutrix submitted her person to the defendant because of the promise of marriage, and not to gratify her own lust, would also be totally inadequate, but for the principle that the jury must pass on contradictory statements of witnesses, because, while she substantially testified on her examination-in-chief that she yielded on account of a previous promise of marriage, she does not say marriage was mentioned at the time of the intercourse, and on cross-examination she testified: "The reason I yielded to defendant was because he told me if anything got the matter with me he would give me medicine to destroy it, or marry me. The act was not repeated, because I did not want to."

The fact that two jurors have said the defendant is guilty has no bearing on the legal question presented. His Honor held as a matter of law that there was supporting evidence, and the juror, acting upon this ruling, had the right to convict.

STATE v. G. W. CRAIG.

(Filed 20 November, 1918.)

1. Criminal Law—Verdict—Judgment.

Where the jury, properly drawn and empaneled, have rendered a verdict that the defendant is not guilty of the crime for which he was tried, or which, by fair intendment, has that significance, it should be received by the court and recorded as rendered, and as a rule it must be acted upon according to its true intent and meaning.

2. Same—Alteration—Appeal and Error.

The verdict of the jury in the defendant's favor, in a criminal action, may not ordinarily be questioned on appeal, or set aside, or materially altered by the trial judge, to the defendant's prejudice, or by the jury itself, after it has been finally received and recorded.

3. Criminal Law—Verdict—Fraud—Jeopardy—Judgments.

The only exception recognized in the courts of this State to the rule that the trial judge should receive and act upon the verdict of a jury in a criminal action, as the jury renders it, is that for fraud in the trial, or procuring of the verdict on the part of the defendant or those acting for him, and to the extent that makes it manifest that, in fact and in truth, there has been no real trial and the defendant was not in jeopardy by reason of it.

4. Statutes—Criminal Law—Offense Specified—General Description.

Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by proper interpretation, be confined to acts and things of the same kind.

5. Criminal Law—Criminal Insane—Offense Specified—General Description —Insanity—Acquittal—Judicial Investigation.

Our statutes establishing a department for the criminal insane in the penitentiary, and prescribing the method by which the trial judge may detain the prisoner found not guilty of a criminal offense by the jury on the ground of insanity or want of mental capacity, specifies a high degree of crime, such as murder, rape, and the like, indicating a class of criminals who may be dangerous to the public or individuals, if left at ward, and by the addition thereto of the words, "or other crimes," did not include within their intent and meaning the offense of resisting an officer when arrested, especially, as in this case, the resistance was only by words, in the nature of a threat that the officer could not take him alive. Revisal, secs. 4612-4622, inclusive.

6. Criminal Law—Insanity—Criminal Insane—Acquittal—Judicial Investigation—Constitutional Law.

Revisal, secs. 4612-4622, permitting the trial judge to make investigation for the purpose of deciding upon committing the prisoner, relieved by the verdict of the jury from sentence for a criminal offense, on the ground of insanity or mental incapacity, to the department in the penitentiary for the criminal insane, is within the Legislature's constitutional authority, but, being a restraint of his liberty within the constitutional guarantee for his protection, should be strictly construed in his favor.

7. Statutes—Penal Statutes— Criminal Law— Insanity— Acquittal— Detention of Prisoner—Judicial Investigation.

Our statutes giving to the trial judge the authority to detain the prisoner found not guilty of a criminal offense because of insanity or mental incapacity, and to make an investigation upon the question of committing him to the department of the criminal insane, is penal in its character. Revisal, secs. 4612-4622.

8. Criminal Law—Resisting Arrest—Insanity—Acquittal—Discharge—Judicial Investigation—Criminal Insane—Statutes.

Where the offense charged is resisting arrest and the jury has found that the prisoner "did not have mental capacity to commit it," he should be discharged, and the trial judge is without authority, under our statutes, to detain the prisoner while investigating whether he should be committed to the department in the penitentiary for the criminal insane. Revisal, secs. 4612-4622.

STATE *v.* CRAIG.

INDICTMENT for resisting an officer, tried before *Shaw, J.*, and a jury, at May Term, 1918, of ROCKINGHAM.

The case on appeal states that the jury returned into open court and announced their verdict of "Not guilty." Thereupon, his Honor inquired whether the verdict was upon the ground that the defendant did not have mental capacity to commit a crime at the date of the alleged crime, and the foreman of the jury answered, "Yes." His Honor then had the following entries made: "Verdict, 'Not guilty,' upon the ground that he had not sufficient mental capacity to commit a crime." Defendant's counsel thereupon moved for his discharge.

Some days thereafter, and on the last day of the term, his Honor announced that he would set aside the verdict rendered by the jury in the case, to which order defendant excepted. His Honor then held defendant to bail for his appearance at the next term of the Criminal Court of Rockingham County, and defendant excepted. The court then set aside verdict and required defendant to give an appearance bond of $50, and defendant excepted. His Honor further made and signed the following order:

"In this case, it appearing that the jury rendered a verdict of 'Not guilty' upon the ground that the defendant at the time of the offense did not have sufficient mental capacity to commit a crime, it is ordered that the Clerk of the Superior Court of Rockingham County, upon due notice to the defendant, make inquiry as to the present mental condition of the defendant and make due report in writing to the next criminal term of this court, reporting also in writing the testimony taken in such inquisition."

Defendant excepted and appealed to Supreme Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. R. Scott, P. W. Glidewell, and W. M. Hendren for defendant.

HOKE, J. When a citizen is put on trial for a crime, and a jury, properly sworn and empaneled, have rendered a verdict of "Not guilty," or verdict which, by fair intendment, has that significance, the defendant is entitled to have the same received and recorded as rendered, and as a rule it must be acted upon according to its true intent and meaning. In this jurisdiction it may not be questioned by appeal, nor can it be set aside or materially altered by the trial judge, to defendant's prejudice, nor by the jury itself, after the same has been finally received and recorded. *S. v. Whisenant*, 149 N. C., 515; *S. v. Savery*, 126 N. C., 1083; *S. v. Arrington*, 7 N. C., 571; Clark's Criminal Procedure, 485; Chitty's Criminal Law, 657; 12 Cyc., 701.

In *S. v. Whisenant, supra,* the principle applicable is stated as follows: "The verdict, then, as stated, amounted, by fair intendment, to a verdict of not guilty. As said in Clark's Criminal Procedure, 486, 'A verdict is not bad for informality or clerical errors in the language of it, if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment and is to receive a reasonable construction, and must not be avoided, except from necessity.' This being a correct interpretation of the verdict as rendered by the jury, it was not within the province or power of the court, after they were discharged, to amend or alter their deliverance, in a matter of substance, to defendant's prejudice." Clark, 487. And our own decisions on both propositions cited from Clark are in substantial accord with the author. *S. v. Arrington,* 7 N. C., 571. In this case it was held, among other things, "That wherever a prisoner, either in terms or effect, is acquitted by the jury, the verdict as returned should be recorded." And *Chief Justice Taylor,* in a concurring opinion, speaking to this question, said: "Some of the harsh rules of the common law in relation to criminal trials have been gradually softened by the improved spirit of the times; and this, among others, is relaxed in modern practice, where the jury bring in a verdict of acquittal. It is considered as bearing too hard on the prisoner, and is seldom practiced. Hawk., ch. 47, secs. 11, 12. I think this course of proceeding is fit to be imitated here, whenever a prisoner, either in terms or effect, is acquitted by the jury, and that in all such cases the verdict should be recorded, although I am persuaded that they were desired to reconsider their verdict in this case with the purest intention and solely with a view that they might correct the mistake they had committed. The verdict first returned ought to have been recorded, and it ought to be done now, *valeat quantum valere potest.* The effect will be the same as if a verdict of acquittal were recorded, but I think it most regular to put upon the record what the jury have found."

The only exception recognized in this jurisdiction is that of fraud in the trial, and procuring of the verdict on the part of the defendant or those acting for him, and to an extent that makes it manifest that in fact and in truth there has been no real trial and defendant was not in jeopardy by reason of it. *S. v. Cale,* 150 N. C., 805-809; *S. v. Moore,* 136 N. C., 581; *S. v. Swepson,* 79 N. C., 632; *Holloran v. State,* 80 Ind., 586; *S. v. Cole,* 48 Mo., 70; 1 Chitty Crim. L., 657.

There is no evidence or claim of fraud in this instance, and the verdict must therefore stand as the true deliverance in the cause.

In *S. v. Haywood,* 94 N. C., 847, the verdict in favor of defendant, which was set aside by the court, was on a preliminary issue, whether the defendant was sane and capable of conducting his defense to the indictment, and not one of acquittal, as in this case. Nor do we find

anything in the record to justify the further detention of defendant as a criminal, nor for an order to make inquiry into his mental condition, with a view of having him confined in the department of the "dangerous insane" in the penitentiary. The verdict of "Not guilty" having been duly rendered, defendant is thereby relieved of any criminal aspect of the charge; and in reference to the order of inquiry into his mental condition, we are of opinion that the law under which his Honor evidently proceeded (chapter 97, sec. 4618, Revisal) does not extend to the charge contained in this bill of indictment or to any charge of like grade. The section in question is a part of subchapter 7, chapter 97, sections 4612-4622, inclusive, establishing a department for the dangerous insane in the penitentiary; and while some portions of this statute seem broad enough to include all cases of persons charged with crime, the particular section involved here is of much more restricted meaning. It provides that when a person is accused of the crime of murder, attempt at murder, rape, assault with intent to commit rape, highway robbery, train wrecking, or other crime, shall be acquitted, upon trial, upon the ground of insanity, or shall be found by the court to be without mental capacity to undertake his defense or to receive sentence after conviction, the court before which such proceedings are had shall detain such person in custody until such inquisition be had in regard to his mental condition, the section then making further provision for the judges to notify certain parties, direct the summoning of witnesses, and himself conducting the inquiry, presently or at a later date. It is a recognized principle of statutory construction that when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind. *S. v. Goodrich*, 84 Wis., 359; *Nichols et al. v. State*, 127 Ind., 406; *Ex parte Muckinfuss*, 52 Tex. Civ. App., 467; 2 Lewis' Sutherland Stat. Construction (2d Ed.), sec. 422; 36 Cyc., 1119. As said in the Texas case, *supra*, it is a principle especially applicable to statutes which define and punish crimes, and is imperatively required in reference to the section considered. Our General Assembly clearly has the power to establish rules and regulations for the care and custody of the insane; indeed, it is enjoined upon it here as a constitutional duty, but such regulations must be in reasonable regard for the rights of persons and property. The well considered case of *In re Boyette*, 136 N. C., 415, opinion by our former associate, *Mr. Justice Connor*, is in full approval of the position that an order detaining a citizen as an insane person, in a hospital, asylum, or otherwise, is a restraint of his liberty within the constitutional guarantees for his protection. The statute, therefore, or this portion of it, conferring as it does upon the trial judge the unusual power of detaining a citizen who has been acquitted by the jury, may become highly penal in

character; and, having specifically designated for its operation the crimes of murder, assault with intent to murder, rape, and assault with intent to commit rape, highway robbery, train wrecking, arson, all crimes of higher grade and in themselves importing serious menace to others, in adding thereto the general terms, "or other crimes," by correct interpretation, means and was intended to mean other crimes of like kind and grade, and does not extend to or include crimes like the present, misdemeanors which are not necessarily and inherently vicious or threatening and may be and not infrequently are committed with very little demonstration of force. In this very instance, while the testimony does not accompany the record, the justice's warrant, initiating these proceedings and made a part of the case, charges that the "offense was committed by threats and saying that no officer could take him alive," giving clear indication that no violence had been committed. Undoubtedly, if in the course of this or any other criminal investigation it should be disclosed by the testimony that a defendant's mind had become so far deranged and the insanity had taken such form as to threaten the safety of his family or friends or neighbors, the magistrate, as a peace officer or under other provisions of the law, could order his present restraint, that proper steps might be taken with a view to his lawful commitment and care, but such conditions are not presented by the record, nor does such power arise under the present section in any charge of this kind, from the mere fact that a jury has acquitted a defendant on the ground "that he did not have sufficient mental capacity to commit a crime."

On the record, we are of opinion that defendant is entitled to an order for his discharge without more, and this will be certified, that the order of inquiry be set aside and defendant's motion for his discharge be allowed him.

Reversed.

STATE v. BONNER H. WENTZ.

(Filed 27 November, 1918.)

1. Homicide — Instructions — Evidence — Intent — "Either" — Words and Phrases.

Upon a trial for murder, the prisoner and his near relatives testified in behalf of the defense, and the wife and mother of the deceased in behalf of the State; and a charge by the court to the jury that they were to scrutinize the testimony of all these witnesses, but after doing so, if they found the testimony of "*either*" of the witnesses worthy of belief, to give it the same weight as if the particular witness had no interest in the result of the verdict, is not erroneous, the word "*either*" being used in the sense of "any," and referring to all of these witnesses.

2. Criminal Law—Witnesses—Defendant—Evidence—Character — Substantive Evidence.

Where the defendant in a criminal action has become a witness in his own behalf, he is subject to cross-examination and impeachment, involving his credibility; and where testimony as to his general character has been introduced upon each side, his evidence may be considered as substantive upon the question of guilt or innocence. *S. v. Atwood, ante,* cited and applied.

3. Appeal and Error—Instructions—Prejudicial Error.

On appeal, the charge of the trial judge will be construed as a whole; and when, thus construed, the appellant's rights have not been prejudiced, error in parts thereof will not be held as reversible.

4. Same—Homicide—Affray—Self-defense.

Where, upon the evidence on a trial for homicide, the judge has fully, clearly and accurately charged the jury as to murder, manslaughter, and self-defense, an instruction upon the question as to whether the defendant entered into the fight willingly, relating to an affray, also involved in the controversy, will not be construed as depriving the prisoner of his right of self-defense, when, if the charge is construed as a whole, it does not so appear and it is not prejudicial to the prisoner. *S. v. Pollard,* 168 N. C., 116, and *S. v. Baldwin,* 155 N. C., 494, cited and distinguished.

INDICTMENT tried before *Adams, J.,* and a jury, at July Term, 1918, of UNION.

The prisoner was indicted for the murder of William Wentz, and convicted of murder in the second degree. When the case was called in this Court, counsel of the prisoner very frankly withdrew all assignments of error, as untenable, except three, which were reserved, as follows:

"1. The first of these is, that the court charged the jury as follows: 'The prisoner has testified in his own behalf. You are to scrutinize his evidence—that is, examine it closely and carefully to ascertain whether you shall believe it. The same applies to the testimony of any of his near relations. *The same principle applies to the testimony of the wife of the deceased and her mother.* You are to scrutinize the testimony of *all* of these witnesses; but after doing so, if you find the testimony of *either* of the witnesses worthy of belief, it is then entitled to the same weight as if the particular witness had no interest in the result of your verdict.'

"2. The second is, that the court instructed the jury that the testimony as to the character of the prisoner, who took the stand as a witness and testified in his own behalf, was competent in two aspects—first, as affecting his credibility, and, second, as substantive testimony upon the question of his guilt or innocence. There was testimony offered by himself of his good character, and also testimony of his bad character.

"3. The third is, that the court instructed the jury as follows: 'Or, if

you find from the evidence that there was a difficulty between them and that the prisoner *entered* into the fight willingly.' "

There was a verdict of guilty of murder in the second degree, and from the sentence of the court the prisoner appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

McCall & Smith, Stewart & McRae, and Stack & Parker for defendant.

WALKER, J., after stating the case: We must commend the learned counsel who defended the prisoner for their very praiseworthy attitude in the discussion of this case. There were numerous exceptions, but from these were culled such as were of apparent merit, and others having no substantial foundation were discarded, and the argument was properly based upon the really material questions and thus stripped of all redundant matter. All exceptions taken during the hurry of a trial, when no sufficient opportunity is given for adequate reflection, should be afterwards weighed carefully, and those found to be wanting in merit should be omitted from the assignments of error. It is always best for both parties, and especially for the appellant, that this should be done, as greater prominence is given to those matters which call for deliberation, and the case is presented in concise and compact form. It saves time, which should not be wasted, and prevents confusion. The one who does this will surely gain by it in the better consideration of his case.

The first exception cannot be sustained, as the prisoner was as much a witness when he testified in his own behalf as any of the other persons who testified for one side or the other, and the context clearly shows that he was to be embraced in the descriptive word, "witness." The judge stated the rule as to the prisoner, and then said the same rule applies to near relatives and to the wife and mother of the prisoner. You must apply the rule "to all these witnesses," clearly meaning the prisoner, who was a witness, as well as the others designated. When the judge told the jury that they must scrutinize the testimony of all these witnesses, and if they found the testimony of "either" of them worthy of belief, it would then be entitled to the same weight as if the particular witness had no interest in the result, he plainly referred to each and every witness who had testified, the word "either" being used in the sense of "any." The lexicographers say that while the word "either," according to its strictly accurate meaning, relates to two units or particulars only, it often, in actual use, refers to some one of many. (Century Dictionary.) It was said in *Misser v. Jones,* 34 Atl. (Me.), at 179, that "either of the foregoing cases" should be held to include "each and

every case previously mentioned." Webster's Dictionary says that the word "either" is properly used for two things, but sometimes of a larger number, for "any one." "Scarce a palm of ground could be gotten by either of those," were the words of Bacon. And Dr. Holmes said that "There have been three famous talkers in Great Britain, either of whom would illustrate what I have to say about dogmatists." These are high authorities and worthy of confidence in their accuracy. We may safely venture to use a word in the sense approved by these erudite scholars. It may be added that while the skilled philologist or the purest in letters may criticise the use of the word in the connection where it was placed, it is quite probable that the plain men of the jury understood its intended and real meaning the better for its use. The other part of this instruction, as to the proper method of weighing and estimating the testimony, was correct, according to our precedents. *S. v. Vann,* 162 N. C., at 541; *Ferebee v. R. R.,* 167 N. C., 295-296.

The second assignment of error also is untenable. When the prisoner elected to become a witness for himself, he was subject to cross-examination and impeachment and to the other disadvantages of being a witness, and his credibility became involved; and when he offered evidence of his good character, and the State of his bad character, this put his general character in evidence substantively, and the jury were not confined to a consideration of it only as affecting his credibility. We have just recently decided the very question in *S. v. Atwood,* at this term (176 N. C., 704), where the Chief Justice said: "Prior to our statutes of 1866, ch. 43; 1868-'69, ch. 209, and 1881, ch. 110, now Rev., 1634 and 1635, which render the defendant in a criminal action competent, but not compelable, to testify in his own behalf, the State was not permitted to give evidence of the bad character of a defendant on trial for crime, unless he himself first put his character in evidence. This was a protection to him, as his mouth was closed. Since the statute, if the defendant or prisoner elects to testify in his own behalf, he is before the jury, both as a witness and a defendant. The prisoner strenuously insists, however, that it was only after he had testified in his own behalf, and the State had introduced evidence of his bad character, he put on proof of his good character, and that he offered this only to 'rebut' the evidence of his bad character and not to put his character in issue. We know of no precedent and of no principle that entitled the prisoner in putting on evidence of his good character to have it restricted to his character as a witness, so as to avoid his character as a defendant being before the jury. The point attempted to be raised is too attenuated to be visible or practicable." In *S. v. Cloninger,* 149 N. C., 567, at p. 571, this Court sustained the following instruction: "Evidence as to the character of a witness, who is likewise a defendant, is competent for two purposes:

(1) to enable the jury to place a proper estimate on the testimony of the defendant who is testifying as a witness; (2) as substantive evidence upon the question of guilt or innocence." And added: "Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. . . . But where a defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence and may be considered by the jury as such."

The third assignment of error is based upon an exception to the charge: "Or, if you find from the evidence that there was a difficulty between them, and that the prisoner entered into the fight willingly." This excludes the plea of self-defense.

The exception does not embrace all of the instructions upon the law as to murder and manslaughter, and it is a well established rule of all courts that the charge must be construed as a whole in order to have a clear understanding as to the meaning and significance of its various parts. *Kornegay v. R. R.*, 154 N. C., 389; *Leggett v. R. R.*, 173 N. C., 698, and *Brown v. Mfg. Co.*, 175 N. C., 201, at p. 204, where we used language peculiarly applicable to this exception, as follows: "If this was all that had been said by the learned judge, there might be some ground for criticism, but it was not, and this shows the necessity for examining the charge, not disconnectedly, but as a whole, or at least the whole of what was said regarding any special phase of the case or the law."

Before giving the instruction, to which this exception is taken, the court very fully and clearly charged the jury as to murder, manslaughter, and self-defense, and especially with strict reference to the different aspects of the evidence in the case, and its application to the several views presented, and this takes it out of the principle as laid down in *S. v. Baldwin*, 155 N. C., 494, and *S. v. Pollard*, 168 N. C., 116. The court had correctly charged, and in a very careful and particular way, as to the different degrees of murder, as to manslaughter, and as to self-defense, and when the instruction complained of is read with proper reference to what precedes it, and in view of its visible connection and close alliance therewith, the jury could but have inferred that when the judge used the words, "difficulty" and "fight," he referred to an affray between the parties, in which they had mutually and willingly but unlawfully engaged, and also that if in the difficulty the prisoner acted in self-defense he could not be convicted of any crime, and should therefore be acquitted. Any other construction of the charge would make it contradictory, whereas if the supposed objectionable phase is read with the

context where it appears, and the proper meaning given to each of its parts, the charge becomes consistent and harmonious. The jury could not, under a charge, which fully explained how the evidence should be applied to the various phases of the case, conclude that if the prisoner entered the fight in self-defense he could be convicted, although he did so willingly, the only possible and legitimate construction being that if he acted simply in self-defense he should be acquitted, but if he engaged in an affray with the deceased—that is, in unlawful combat—and did so willingly, he could not set up in his exoneration that he acted in self-defense.

The case of *S. v. Clingman Harrell,* 107 N. C., 944, sustains the charge, and decided a question which is much like the one we have before us. It was held that if there was a fight into which the parties entered willingly, they were guilty of an affray, and it could make no difference that after it started with his consent, and during the further course of the combat, the defendant continued to fight because he apprehended that his adversary had formed the purpose of making a violent assault upon him, and that he shot at deceased under this apprehension. The court, in that case, had instructed clearly as to self-defense, and the jury was fully informed, by construing the charge as a whole, that by a willingness to fight was meant that there must be no ground of self-defense, but simply an affray, without any such element, or where the parties fought willingly and without any legal excuse.

While this is true, we deem it proper to say that instructions should be free from any obscurity in the respect pointed out, so that the jury may not infer that if there is any legal excuse for the act of the prisoner he would be guilty simply because he may have fought willingly. If we were of the opinion that there was any peg in this case upon which to hang a fair doubt as to the meaning of the charge, we would order a new trial, but when we read all of the charge we do not think there is.

Immediately after giving the instruction to which this exception was taken, and in direct connection therewith, the court charged the jury emphatically as to self-defense, and immediately before it enumerated all acts which upon the evidence could fix guilt upon the prisoner, except a simple affray, showing clearly that by these words he was describing an affray in its technical sense.

A case resembling this one in its facts is *S. v. Crisp,* 170 N. C., at p. 791, where it is said: "In the present case his Honor in effect charged the jury that if the testimony of defendant was believed, they would acquit him. The jury, therefore, having received and acted on the State's evidence as presenting the true version of the occurrence, therefore, in the light of this testimony and the principles of law heretofore stated, his Honor was clearly justified in charging the jury, as he did,

that if the defendant entered into the fight willingly or used language calculated and intended to bring it on, he could not maintain perfect self-defense, unless he satisfied the jury that he had quitted the combat, etc., the State's evidence tending to show that the defendant, with his pistol continuously in evidence, had used language towards deceased that under the circumstances was well calculated to provoke a breach of the peace; and, further, that at the commencement of the difficulty he had made a hostile and threatening demonstration with the weapon."

We find no error in the trial or the record.

No error.

STATE v. RUBE WILSON.

(Filed 4 December, 1918.)

1. **Appeal and Error—Objections and Exceptions—Briefs.**

Exceptions not insisted upon in appellant's brief will be deemed as abandoned on appeal.

2. **Evidence—Silence—Admissions—Larceny and Receiving—Criminal Law.**

The narration by a witness of circumstances, in the presence of the defendant on trial for receiving stolen goods, etc., tending to convict him of the offense, is not objectionable as attempting to show an admission, by his silence, of matters he was not required to deny, when the witness also testified that the defendant then admitted its truth, and at least harmless to the extent that he relied thereon by his own evidence in defense.

3. **Appeal and Error—Objections and Exceptions—Grounds Stated.**

On appeal, the appellant is restricted to the ground of objection to the admission of evidence he has given on the trial of the cause in the lower court.

4. **Appeal and Error—Objections and Exceptions—Evidence—Competent in Part.**

An objection to the admission of evidence that is competent in part, without particularizing and excepting to the incompetent part, is untenable on appeal.

5. **Receiving Stolen Goods—Larceny—Evidence—Appeal and Error—Harmless Error.**

Where, upon the trial for receiving stolen goods, there was evidence tending to show that the defendant's brother-in-law stole the goods and gave them to the defendant's wife and members of his household, and they were found in the attic of defendant's house and upon his person; that he knew where they were, but at first denied this knowledge, and relied in defense upon the theory that his wife's brother had given them to her in his absence, and that he did not know that they had been stolen: *Held*, the exclusion of testimony of the wife's mother, in whose house also some

of the stolen goods had been found, as to whether she had seen the stolen goods given to defendant's wife, is harmless and also immaterial, the fact not being controverted and all the evidence tending to show that the defendant and his wife were acting in collusion.

6. Receiving Stolen Goods—Larceny—Instructions—Scienter.

Where the charge of the judge, construed as a whole, is not prejudicial to the appellant's rights, it will not be held as reversible error on appeal; and where the appellant has been tried for receiving stolen goods, with evidence tending to show that he did so, knowing that they had been stolen, a charge to the jury in effect that they must find the ultimate fact of the defendant's knowledge beyond a reasonable doubt, with the burden of proof on the State, in order to convict him, and so emphasized that the jury could not have well misunderstood the instruction, though not repeated in other disconnected portions of the charge, is not reversible error as to the *scienter*.

7. Receiving Stolen Goods — Larceny — Evidence — Inquiry — Knowledge—Scienter.

Where there is evidence of such facts and circumstances as would put the defendant, tried for receiving stolen goods, upon such inquiry as would lead to knowledge that they had been stolen, the jury may infer that such knowledge had been obtained by him by proper inquiry, and so fined upon the question of *scienter*.

INDICTMENT for larceny and receiving stolen goods, knowing them to have been stolen, tried before *Cline, J.*, and a jury, at August Term, 1918, of YADKIN.

A quantity of goods was stolen from the Gilmer Bros. Company, of Winston-Salem, during the early spring of this year. Among the porters who worked at the store were Jim Houser and Hurley Houser, who lived in Yadkinville. The stealing had been going on for some months. Mr. Gilmer, the secretary-treasurer of the company, went with the officers to Yadkinville a Sunday later, provided themselves with search warrants, and found goods of the value of $500 or $600 which Mr. Gilmer identified as the property of his company. Among other houses in which they found a quantity of goods was that of Sant Houser, the brother of Jim, the father of Hurley and the father-in-law of the defendant, Rube Wilson. The defendant himself lived in a small one-room house in the same yard and about 40 feet from the house of Sant. In the defendant's house they found $50 or $60 worth of goods which Mr. Gilmer identified as coming from the store of his company. Rube Wilson's defense was that these goods were given to his wife by her brother, Hurley Houser, in his absence, and he had no reason to suspect that they were stolen, or that they were given to her by her brother.

The following circumstances were relied upon by the State as showing the guilty knowledge of the defendant:

1. When told by the witness, Thompson, that if he knew of any of the

goods being in his house, he had better tell about it and not conceal it, he replied that he would not try to conceal any stolen goods, but if he knew of any, he would tell the officers at once. He then turned off and went in his house.

2. Some ten or fifteen minutes afterwards the officers found most of the goods he is charged with receiving in the attic of his house, while he had concealed upon his person a silk shirtwaist identified by Mr. Gilmer as the property of his company.

3. The defendant's admission that he placed the goods in the attic because he wanted to hide them and he did not want to get in trouble.

All these and other circumstances in the case were submitted to the jury, and they found the defendant guilty of receiving the stolen goods.

Verdict of guilty, and judgment thereon. Defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Benbow, Hall & Benbow and A. E. Holton for defendant.

WALKER, J., after stating the case: The defendant's counsel, in their brief, do not insist on their exception to the refusal of the court to nonsuit the State upon the evidence. This exception, then, will be taken as waived; but there being some evidence of guilt, the refusal to nonsuit was proper. *S. v. Carlson,* 171 N. C., 818.

We will now consider the assignments of error, in the order of their statement in the record:

1. The defendant objected to the following testimony of the witness, Thompson: "Rube denied any knowledge of this property until we caught the other parties, and Hurley Houser said he got the goods at Gilmer Bros. Company and turned over a good deal of it to his folks. It was in Winston that Hurley said that. Hurley said that he had given the coat to Rube's little boy and the waist to Rube's wife—that is the waist we got out from under Rube's jacket. Rube acknowledged that was the way it come. My recollection is that Rube said that he threw these articles up in the attic because he did not want to get in trouble, to hide them while we were searching Sant's house." The ground of objection was that this, though said in defendant's presence, did not call for a reply from defendant, and so could not be taken as an admission, he standing silent. This is a misapprehension of what occurred. The defendant did not remain silent, as the last clause quoted above shows: "Rube acknowledged that was the way it come." The latter part of the testimony was clearly competent, and even if the first part of it is incompetent, the objection must fail, as it was taken to the whole of it. *S. v. Ledford,* 133 N. C., 722; *Phillips v. Land Co.,* 174 N. C., 542, 545, and

cases cited. Besides, the last part of the evidence is what the defendant attempted to prove himself, as appears in the case. In any view, therefore, it was harmless, if there was any error. There was no doubt that Hurley Houser stole the goods at Winston from Gilmer Bros. Company, and the only question was whether defendant received them with knowledge that they were stolen. The defendant is restricted to the particular ground of objection stated in the court below, which is clearly untenable. *Bridgers v. Bridgers,* 69 N. C., 451; *Gidney v. Moore,* 86 N. C., 485; *Ludwick v. Penny,* 158 N. C., 104. It was held in the *Bridgers case* that "A party objecting to the introduction of evidence must state with certainty the points excepted to; and if the ground stated for such objection be untenable, it is error to reject the evidence, though inadmissible if properly objected to." And in *Gidney v. Moore,* 86 N. C., 485: "A general objection to obnoxious evidence will be sustained if upon any ground the evidence should be rejected; but where the ground of an exception can be inferred from the record, another cannot be assigned here, the ground of an exception being a part of the exception itself."

2. The defendant's mother was called as a witness, after it appeared from the evidence that a quantity of the stolen goods were found in her house. She was asked by defendant's counsel:

"Q. Did you see him give his wife anything? Did you see him bring anything else there?" (Objection by the State; objection sustained; defendant excepts.)

The defendant offered to show that the goods found at his house were given to his wife by her brother, Hurley Houser, in his absence. The exclusion of this evidence was harmless. It was admitted by both sides that the stolen goods were carried to the defendant's house by Hurley Houser. It also was immaterial, because, though some of the goods may have been delivered to his wife in his absence, if he received them on his return, knowing them to have been stolen, it would have made him just as guilty as though he had received them originally, as there was evidence from which the jury could have found that defendant and his wife were acting together under a previous arrangement, although the goods were actually delivered to her in his absence. The evidence was that they were carried there for the family, defendant being the head of the household. The theory of the State was that he assumed control over the property, whether delivered to his wife in his absence or not, hid it, denied having it, and otherwise showed guilty knowledge. *S. v. Stroud,* 95 N. C., 626; *Sanderson v. Commonwealth,* 8 Am. Crim. Rep., p. 687 and p. 691.

3. As to the *scienter.* The charge of the court must be read as a whole (*S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.,* 154 N. C., 389; *S. v. Orr,* 175 N. C., 773), in the same connected way that the judge is

supposed to have intended it and the jury to have considered it, and when thus read we find no reversible error. The judge told the jury several times, and especially in the last sentences of his charge, that the ultimate fact for them to find, beyond any reasonable doubt, was whether defendant received the goods knowing that they had been stolen, and the jury could not well have understood that this was not the vital fact in the case. He distinctly instructed them that they could not convict the defendant unless he received the goods "which he knew were stolen." There was strong evidence that he knew they had been stolen. His concealment of them in the attic of his house, and especially of the waist on his person, was convincing proof of his guilty knowledge, under the circumstances surrounding the concealment. There is really sufficient evidence of a conspiracy between all the parties to commit extensive robberies or stealings by wholesale quantities. It is quite impossible to believe that the defendant did not know how the goods were obtained, and that his generous relatives did not come by them honestly. That which a man in the defendant's position should have suspected, the jury had the right to infer that he did suspect, as far certainly as was necessary to put him on his guard and on his inquiries, and they might conclude, if they saw fit to do so under the evidence, that he had made the proper and usual investigation and discovered the facts, if he was not already cognizant of them. 2 Wharton Cr. Law (2d Ed.), p. 1449; *Collins v. State,* 73 Am. Dec., 426; *Comm. v. Finn,* 108 Mass., 466; *Frank v. State,* 67 Miss., 125; *S. v. Goldman,* 47 Atl. Rep. (N. J.), 641; *S. v. Adams,* Anno. Cases, 1914 B, p. 1109, where the correct principle is stated and illustrated.

The other exceptions are either formal or without any merit.

No error.

STATE v. LONNEY OAKLEY.

(Filed 11 December, 1918.)

1. Criminal Law—Involuntary Manslaughter—Negligence—Evidence—Contributory Negligence.

Contributory negligence is not a defense to a charge of involuntary manslaughter, and may only be considered in its relevancy to the question of the defendant's negligence, which must be in a greater degree than that required to sustain a civil action for damages. *S. v. Tankersly,* 172 N. C., 959, cited and applied.

2. Criminal Law—Evidence—Nonsuit—Trials.

While the evidence upon a trial for involuntary manslaughter must be considered in the light most favorable to the State, upon defendant's

motion as of nonsuit, it does not require the inference of the worse intent of which the evidence is possibly capable.

3. Same—Automobiles—Speed Limits.

Upon a trial for involuntary manslaughter, the evidence for both the State and the defendant tended to show that the defendant was traveling along a country road, driving an automobile at a lawful speed, and ran upon and killed the deceased while endeavoring to pass the forward machine, which had stopped at the home of the deceased; that the deceased was a lad, and, becoming confused, stepped from the space between the two machines, where he could have safely remained; that the deceased and his competent driver knew that the defendant was following them, and with this knowledge the deceased alighted in this dangerous position; that the prisoner knew the deceased was in the forward machine, driven by a careful and competent man, and also where he lived: *Held*, this evidence was insufficient to be submitted to the jury, and defendant's motion as of nonsuit thereon should have been sustained.

APPEAL by defendant from *Cline, J.*, at August Term, 1918, of WILKES.

The defendant was convicted of involuntary manslaughter, and from the judgment upon such conviction appealed to this Court.

The facts, as stated in the brief of the State, are as follows:

Russell Mink, a young boy, about 11 years old, was killed on 30 May, 1918, under the following circumstances: He was riding in a car of W. E. Colvard, sitting on the front seat, to the right of Colvard, who was driving. Following Colvard's car was that of defendant Oakley, both cars running about 25 miles an hour along a highway in Wilkes County. Oakley knew the boy, knew his father, and knew the boy was in the car, and knew where they lived. When approaching Mink's house, which was on the left of the road, Colvard gave a signal (and this was so understood by the defendant) that he was going to stop at Mink's house, began to "slow up" and direct his car to the left of the road. His car did stop in front of Mink's, on the left side of the road. There is evidence that defendant knew that the boy was sitting on the front seat, to Colvard's right, and that the steering wheel was on the left. The defendant admitted that when the car would go around curves he could easily see him, and when the car stopped "I had an idea that it had stopped to let the Mink boy get out at his home." The boy did get out at the right, and into the road, and, seeing defendant's car coming, lost his head, attempted to run across the road in front of it, was knocked down and dragged by it about 20 feet, when, one of its hind wheels going across his head, he was killed. If he had stopped short upon getting out, he would have avoided any danger, as the interval between the cars would have been from 3 to 7½ feet. The defendant was in a hurry to get to Wilkesboro, and, at the time he was passing the Colvard car, was

going at the rate of 18 or 20 miles an hour, while the witness, Colvard, testified that he was going at the rate of 25 miles an hour.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was overruled, and he excepted.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. C. Bowie for defendant.

ALLEN, J. The conduct of the deceased, if amounting to contributory negligence, is no defense to the charge of involuntary manslaughter. *Schultze v. State,* Ann. Cases, 1912, C. 501; 2 R. C. L., 1213. It is, however, material and relevant to the extent that it bears on the question of the negligence of the defendant. *S. v. Campbell,* 18 Ann. Cases, 236.

But negligence alone, which might be sufficient to sustain a civil action, will not justify a conviction for manslaughter.

The question was carefully considered in *S. v. Tankersley,* 172 N. C., 959, and the following principle announced: "All of the authorities are agreed that in order to hold one a criminal, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue, and that in order to a conviction of involuntary manslaughter, attributable to a negligent omission of duty, when engaged in a lawful act, it must be shown that a homicide was not improbable under all the facts existent at the time and which should reasonably have an influence and effect on the conduct of the person charged. . . . A negligence which will render unintentional homicide criminal is such carelessness or recklessness as is incompatible with a proper regard for human life. An act of omission as well as commission may be so criminal as to render death resulting therefrom manslaughter. But the omission must be one likely to cause death."

These are our guides in determining whether there is evidence of the guilt of the defendant, which ought to have been submitted to the jury; and while the evidence must be considered in the light most favorable to the State, this being a motion for judgment of nonsuit, "It is neither charity nor common sense nor law to infer the worst intent which the facts will admit of." *S. v. Maney,* 86 N. C., 660.

The fact which stands out prominently and about which there is no debate is that the defendant was not exceeding the speed limit prescribed by statute, and he was not therefore engaged in an unlawful act. He was driving along a country highway with no one in sight except the occupants of the car in front. He knew the forward car was going to stop, and thought it was for the purpose of letting Russell Mink get out

at his home, but he also had notice that the occupants of the forward car knew he was running behind, because they had signalled him.

Colvard, the driver of the front car, was a man of mature years, as the defendant knew, and he says Russell told him of the car behind. When Colvard stopped at the Mink home he left no room to pass on his left and the defendant turned to the right, still running at a lawful rate of speed, and as he passed the little boy got out of the Colvard car and ran in front of the defendant's car and was killed.

Colvard, the principal witness for the State, testified, among other things: "My car was still when he stepped out and there was plenty of room for him to have stood by my car and let the other car pass. Apparently when he saw he was going to be hit he run in front of the car. Almost immediately when he stepped out of the car the other car struck him. The boy stepped out so quickly the other fellow had not had time to see him before it happened."

We fail to see in this any evidence of recklessness on the part of the defendant, or any facts or circumstances which could reasonably lead him to believe that his passing the forward car would probably cause death or serious bodily injury.

Knowing that Colvard was a full-grown man, and that he and Russell knew the car of the defendant was behind and running, the defendant might reasonably expect, instead of injury or death, that the boy would stay in the car until he passed, or if he tried to get out that Colvard would not let him do so, or if he got out he would remain in a place of safety and would not run in front of a moving car.

In our opinion the motion for judgment of nonsuit ought to have been granted.

Reversed.

ADDENDA (*by request*).

IN RE STONE (*ante*, p. 336).

FINDINGS OF FACT AND ORDER OF CLERK OF SUPERIOR COURT OF WAKE COUNTY.

This motion to allow attorneys' fees in this proceeding coming on to be heard on 29 June, 1918, and being heard, the court overrules the motion to dismiss for want of jurisdiction, and the said guardian excepting to the same, R. W. Winston, Col. John W. Hinsdale, and John W. Hinsdale, Jr., testify in the case. It is agreed that all orders, records and evidence, including orders, pleadings, judgments and decrees

in this litigation in all the courts, constitute a part of the evidence now taken.

The following facts from the evidence are found in addition to what appears in the record:

Emmet P. Stone was appointed next friend of the infant, Thomas S. Stone, in September, 1916; previous to said date he had employed M. N. Amis in this matter. Subsequent to said time he employed Winston & Biggs as attorneys to represent him as next friend of said infant, and he likewise continued the employment of Mr. Amis after he was appointed next friend. The amount of the fee to be paid said attorneys was not agreed upon or mentioned, but the next friend instructed them to recover the said infant's part of the $10,500 in litigation.

The administratrix, Mrs. Stone, filed her final report 22 June, 1916, in which she stated that $10,500 was paid her not as administratrix but in her individual capacity, and that it was not included in her report as administratrix. The clerk heard protracted argument and adjudged that when she received said sum as administratrix, by operation of law, it passed to her as guardian, and she was responsible as guardian for two-thirds of same which belonged to her ward. She appealed to the Superior Court and lost, and then to the Supreme Court of North Carolina and lost, and then to the Supreme Court of the United States and her appeal was dismissed because her attorneys committed the error of applying for a writ of error instead of a *certiorari*.

Winston & Biggs and M. N. Amis rendered necessary services for the next friend in the Superior Court before the clerk and before *Bond, J.*, in the Supreme Court of North Carolina, in the Supreme Court of the United States, and then again before the clerk, and again before *Judge Ferguson* in the Superior Court, and again in the clerk's court to require her to file a final account and to include the sum of $6,500, and upon a motion to attach her for contempt.

In each matter she filed an answer, attempting to raise a Federal question and claiming that she was not estopped by any proceedings because the United States Court had not passed on her appeal. Said attorneys instituted suit in the Superior Court, filed a complaint and notice of *lis pendens* to bind the house and lot which she purchased with the money paid her by the railroad for the death of her husband; that she did not recognize the interest of said infant in said fund until this proceeding was begun; that she converted the said sum to her own use in purchasing a house and lot and taking a deed in her own name and in lending out the same in her own name, and that that condition exists now. That the services of said attorneys were necessary to protect said infant's estate and were valuable, and that the result of said

services was the addition of $6,500 to said estate. That Col. John W. Hinsdale and John W. Hinsdale, Jr., are attorneys of this bar in good standing and large experience, and that after hearing the testimony of R. W. Winston as a witness, and from their knowledge and experience as lawyers, testified that $1,000 was a reasonable fee for services rendered. That a printed brief was filed in the Supreme Court of North Carolina and of the United States, and an oral argument in both courts; that R. W. Winston went to Washington and was out of his office four days in the necessary representation of said case to the United States Supreme Court; that the necessary expenses of said trip which he paid was about $50, and that he has paid the necessary costs of the case as it proceeded; that the next friend is the uncle of the infant on his father's side; that he has never had any funds or property of the infant in hand; that said next friend acted throughout the said litigation in good faith; that each step taken was necessary to protect the infant's estate, and but for the same the infant might have lost the entire $6,500; that the matters involve delicate and difficult law questions which have been hotly contested by Mrs. Stone and her attorneys; that the attorneys of the next friend have had numerous conferences and have given a great deal of time and attention to the preparation of the case; that the Supreme Court of the State was divided on the case by a 3 to 2 vote.

Upon the foregoing facts and from the entire record it is adjudged that the fund of $6,500 recovered in this litigation, and a large portion of which is now in the guardian's hands and under the supervision of this court so recovered for said infant by the efforts and labors of said next friend and his attorneys, should not escape the necessary costs and expenses incurred in its recovery, and that in addition to the other costs to be taxed by this court that $650 be by said guardian paid into this court as necessary and proper costs of the attorneys of record in making and saving said recovery to said infant's estate. It is ordered that the said guardian pay said sum of $650 into this court for said purposes.

From this order the guardian appeals, and so do the attorneys for the next friend. The bill of the attorneys will constitute a part of the record. (Signed) MILLARD MIAL, *C. S. C.*

JUDGMENT OF STACY, JUDGE.

This cause coming on to be heard at the June Term, 1918, of Wake Superior Court, before Hon. W. P. Stacy, judge presiding, upon the appeals by both sides from the order of Millard Mial, Clerk of the Superior Court of Wake County, entered in this cause on 29 June, 1918, and being duly heard, after due consideration and after argument by

counsel for each side, the findings of fact of said clerk are in all respects approved and confirmed by the court, except the allowance of $650 to the attorneys for the next friend; and as to that the court is of the opinion, and so finds, that said sum is not a reasonable fee, but that $1,000 is a reasonable and proper fee for said attorneys, and the findings of fact and order of said clerk is modified in this respect.

W. P. STACY, *Judge Presiding.*

PROCEEDINGS OF THE

NORTH CAROLINA BAR ASSOCIATION

IN THE SUPREME COURT ROOM

RALEIGH, 4 JANUARY, 1919, ON THE OCCASION OF THE CENTENNIAL CELEBRATION OF THE

ONE HUNDREDTH ANNIVERSARY

OF THE ESTABLISHMENT OF

THE SUPREME COURT

OF NORTH CAROLINA

The speakers chosen for the occasion and their remarks appear as follows:

A CENTURY OF LAW IN NORTH CAROLINA.

By Hon. Robert W. Winston.

A fair test of the worth of a government is the affection in which it is held by the citizen. It is by this standard we love to measure our brave State. Wherever a North Carolina man may go, his heart remains with his people; the sylvan Toé wanderer through the woods; Mount Mitchell, standing forth without a peer; the bleak sand-dunes of Nags Head—every foot of ground is dear to us. As the wintry winds blow through her forests of pine, or the sounding waves beat against the shores, where Virginia Dare was born, or the Cape Fear majestically sweeps to the deeper sea, it is of Moore's Creek, Guilford, King's Mountain, and of freedom, they tell—it is of unyielding resistance to unjust authority, of undying devotion to free government, based upon law. This is our heritage, this our birthright.

How has it come about, that there is still one spot on this mad and frantic globe, one spot where no red flag has ever waved, where the people are confiding and contented, where the God of our fathers is still enthroned?

Constitution—Ark of Covenant.

One who loves his State as a true son should love her will try to make true answer. We are a people, one in race, one in language, one in religion, and one in ideals; a people without itching ears. We have no great cities; our per capita wealth is evenly distributed; eighty per cent of our population are tillers of the soil; more than fifty per cent of the white adults are landowners; less than one-half of one per cent

are foreign born—great auxiliaries, no doubt, to a stable and conservative government—but greater, far greater, than these are our just and equal laws, administered without fear, favor or affection, reward, or the hope of reward. If our sister States of the South have had such statesmen as Jefferson, Calhoun, and Clay, they have had no such jurist as Ruffin. Morley, I think, rightly contends that the great magistrate has as least as good a title to the front place in the Temple of Fame as the highest political servants or leaders of the State.

The distinguishing feature of our American Commonwealths is their constitutions. The attitude of North Carolina toward her Constitution manifests the reverence in which we hold it. Only once in a hundred and forty years has North Carolina materially changed her fundamental law. Louisiana and Georgia have each had seven constitutions; Virginia, Arkansas, and South Carolina have had five each; Pennsylvania four, and Illinois, New York, and Delaware three each.

As to our national charter, others may look upon it as dishonest, but North Carolina judges, in the main, agree with Burke that no man should approach to look into its defects or corruptions but with due caution; that he should never dream of beginning its reformation by its subversion; that he should approach to the faults of the State as to the wounds of a father—with pious awe and trembling solicitude. By this wise prejudice, we are taught to look with horror on those children of their country who are prompt rashly to hack that aged parent in pieces and put him into the kettle of magicians, in hopes that by their poisonous weeds and wild incantations they may regenerate the paternal constitution and renovate their father's life. Our judges feel, with Webster, that written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former. Bryce expressed the same idea that our National Constitution is the ark of the covenant, whereon no man may lay rash hands; and Bryce was but following De Toqueville, M. Emile Boutmy, Gladstone, Lieber, and Henry Maine.

Our first State Constitution was adopted at Halifax in 1776. Its founders were determined that not one drop of blood which had been shed on the other side of the Atlantic during seven centuries of contest with arbitrary power should sink into the ground, but the fruits of every popular victory should be garnered up in this new government. Neither Greece nor Rome was their model, nor was Plutarch's Lives or Rousseau's Social Compact their guide. Unlike Mirabeau, Danton or Robespeare impracticable, high-sounding, they were level-headed and workable men; Hooper, Harnett, Abner Nash and Samuel Ashe, the conservatives, standing stoutly against the radicalism of Bloodworth, Person, and Wiley Jones. The result of their deliberations was a wise and practical compilation of the fundamental principles which mankind, climb-

ing upward for centuries, had wrested from kings and tyrants, each word wet with the blood of heroes; Magna Charta of King John, of Henry III. and Edward I., the Petition of Rights of Charles I., and the Habeas Corpus acts of Charles I. and Charles II., and the great Bill of Right of William and Mary.

One hundred years ago, and as it is today, the common law of England was the law of this State, and there were then few statutes regulating human conduct or controlling human affairs. At that time our highways were of mud; there were no railroads, few corporations, no complicated machinery, and little commerce. The common law of England was well adapted to these primitive conditions and to the life of a simple and turbulent people, its very rigidity and harshness increasing its effectiveness. It was a day of abstractions and scholasticism. Scholars were interested in words, not in things, their concern largely being to distinguish and divide a hair twixt south and southwest side.

It is not fair, I think, to berate our forefathers because they did not enjoy the blessings of universal suffrage and the benign laws which we have today. More urgent things at that time demanded their attention. First the blade, then the ear, after that the full corn in the ear. They had not forgotten the military policy of the Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who poured themselves all over Europe after the fall of the Roman Empire and established the feudal system on the continent and in England; so firmly indeed in England that not until the twelfth year of Charles II. was it abolished (and in Germany not until November 11, 1918). A system of slavery more complete cannot be imagined, with its aids, relief, primer—seisin, wardship, control after marriage, fines and escheats. Nor were the doings of the Stuarts and the Georges forgotten, taxation without representation, the suspension of the writ of *habeas corpus,* ship money, the forfeiture of charters, and the encroachments of the sovereign. The early patriots greatly feared a judge owned by king or commonwealth, whose sole office was to do his master's bidding. Bloody Jeffreys was to them more than a warning, and they resolved that another Thomas Moore should not die for conscience sake, nor should another Bedford jail imprison a Bunyan, innocent of crime. Free speech, free thought, free conscience, a free religion, and the fundamentals of a free existence mightily concerned our forefathers in '76 and 1819.

NORTH CAROLINA FOUND HERSELF, 30 TO 40.

North Carolina was not ripe for progress until the decade, 1830 to 1840, when England's reform movement of 1832 abolishing slavery, emancipating the Catholics, and culminating in the reform bill of that

year swept across the Atlantic and made its impress on this Commonwealth. In 1835 a constitutional convention composed of the ablest men of their day was held in Raleigh. It changed the basis of representation by abolishing borough towns, which had possessed the right, *suo vigore,* of additional members in the General Assembly; by taking away from the General Assembly the election of the Governor and by giving this privilege to the people; by taking the right to vote from free negroes, and by striking out the sectarian test for office-holding. These reforms were passed by the smallest margin possible—31 to 30 in the Senate, four Eastern Senators uniting with the Western Senators chiefly from patriotic motives, but also because of the Catholic emancipation provision which removed all doubt of the right of the beloved Judge Gaston to hold the office of Supreme Court Judge, to which he had just been appointed. An era of prosperity followed. The old *laissez faire* policy of Nat. Macon received its first blow. The attention of the State was turned toward the building of roads and highways, the inauguration of a public school system, the deepening of rivers and harbors, the construction of railroads, and to general internal improvements.

In 1833 a great industrial convention had been held in Raleigh. It was composed of a hundred and twenty-five delegates from many counties. Many delegates favored a plan of railroad construction from north to south, but a larger number advocated connecting our seaboard with the mountains of this State and Tennessee. The plan finally adopted was to construct a railroad from Shephard's Point, now Morehead City, running through Goldsboro, Raleigh, Greensboro, thence on to Asheville, Murphey and Ducktown.

"To this era belong the erection of the present State Capitol, the building of the North Carolina Railroad, the Atlantic and North Carolina Railroad, the beginning of the Western North Carolina Railroad, the organization of the North Carolina Agricultural Society, the erection of the first hospital for the insane, the founding of the State School for the Deaf and Dumb and the Blind, the establishment of a system of public schools, the expansion of the University from a local high school with ninety students into a real college, whose five hundred students represented every State from the Potomac to the Gulf of Mexico, and many other progressive measures that lie at the very foundation of the present prosperity, honor and glory of the State."

These forward movements came none too soon. Prior to 1830-40 the old State was in a bad way educationally, industrially, and politically. Few of the people could read and write. East was divided against West. The rotten borough system gave the balance of power to the Eastern counties, having a smaller population than the West, and atrophied by hundreds of thousands of human beings in slavery. Previous to the

Convention of '35 the Governor had usually been so subservient to the Legislature that made him that he was merely a figure head. From '30 to '40 the population of the State was practically at a standstill. The census of 1850 showed that one-third of all native North Carolinians were living in other States. It has taken many years and much effort to overcome the inertia of those dreary days. That our people did not perish is due to the vision of those early men of the Republic who guided and followed its destiny.

Time would fail me to tell of the vision of Archibald D. Murphey, the wisdom of Swain, and the labors of Bartlett Yancey, Joseph Caldwell, Calvin H. Wiley, John M. Morehead, Calvin Graves, William A. Graham and others. Suffice it to say, that because of these men and of their co-laborers in executive chair and legislative halls there came about an "era of progress that within the next quarter century raised North Carolina from the lowest to the highest rank among the slave-holding States of the South in all those things that make for the material, intellectual and social uplift of the people."

MODERN MATERIAL PROGRESS.

The work of these men has been taken up by Vance, by Jarvis, and by Aycock, until the dream of Murphey has become the commonplace of today. Railroads bisect our State from sea to mountains; Beaufort is soon to be a real harbor of refuge. An inland waterway uniting our sounds and bays and lakes from the harbor of Boston to the mouth of the Rio Grande seems assured; the great Bankhead and Capitol to Capitol Highway, and lateral highways, make travel easy and delightful; a six-months school term, just provided by constitutional amendment, will move us high up from our old place near the foot of column of illiteracy. Chapel Hill, under the guidance of Battle, Winston, Alderman, Venable, and Graham, has become, if not the foremost, perhaps the most serviceable, university of the South; and the brain of McIver conceived, and with the aid of Noble, Joyner and others, has made possible the higher education of our women. Spirituous liquors have been excluded from the State, and other progressive and benign laws have been put into effect. Agriculture has not been neglected. The A. & E. College has a great future. Seed selection, soil analysis and fertilization, crop rotation, animal industry, pig clubs for boys, canning clubs for girls, farm-life schools and comprehensive home demonstration work are remaking our rural sections. Today North Carolina spins more cotton than she produces (and more than any Southern State), raises more wheat than she consumes, has the largest per acre cotton yield, is first in the value of tobacco produced, near the top in the production of sweet potatoes,

peanuts, apples, peaches and sorghum, and is in the seventh or eighth place in the aggregate wealth of her farm products.

The most radical change in our fundamental law took place in 1868, when a new Constitution was adopted. The Constitution of 1776 dealt with general principles only, leaving the details to legislative control and supervision, whereas the Constitution of 1868 deals with the details of Government. Of such constitutions, Bryce says that they are no more than codes. It may be remarked that prior to 1868 there were no appeals from our Supreme Court to the Supreme Court at Washington. Now, such appeals are frequent, having to do with interstate commerce, the violation of contracts, Employers' Liability Act, and the Fourteenth Amendment to the Constitution.

ENLARGED DEMOCRACY.

In the last century much has been accomplished through the law-making power to meet the spirit of an enlarged and universal democracy. Human slavery has been abolished and the former slave and his descendants enrolled among the electors. A homestead of one thousand dollars in land and five hundred dollars in personal property has been provided. By the Constitution of '76 only persons owning fifty acres of land could vote for a State Senator, now all electors vote for such Senator. All judges, county and State officials, including the Governor and United States Senators, are now elected by popular vote. A State Primary Law has been on the statute books a short time. It has not been sufficiently tested to justify itself. In State elections at least, it seems to be a failure. The door is open quite wide for any person to become a candidate, but the cost and labor of reaching the voter is great, and there are fewer entrances for office than under the old convention plan. The average elector knows little of an obscure candidate residing in some other county. No doubt the primary will be of value in emergencies, when the advocate of some great popular movement and his cause have become one in the minds of the people. Imprisonment for debt has been abolished; dueling, lotteries, and gambling, thought to be the special privilege of gentlemen a hundred years ago, have succumbed to corrosive statutes sustained by a wise public sentiment. The rights of women have been greatly enlarged. Women are now entitled to the products of their own labors and to damages recovered for injury to her person or property; she may sue alone, execute a contract, and make a will disposing of her real and personal property without the consent or joinder of her husband. And she may be divorced for the one cause formerly allowed to the husband alone—adultery.

TECHNICALITIES ABOLISHED—HUMANE LAWS.

The Code of Civil Procedure, modeled after the Code of New York, was adopted in 1868. It supplants common law, pleading, and practice. John Doe and Richard Roe and Jacob Moreland, the impecunious common vouchee, are no more. No longer does the irate landowner begin his action by the absurd way of writing a note addressed to his "dear" friend, demanding an interest in the term. All such fictions are swept away and in all cases the real party in interest must now bring suit. The distinction between law and equity has been abolished. There is only one form of civil action. Pleadings have been greatly simplified and must contain a plain and concise narrative of the facts, and are to be liberally construed for the promotion of justice. A defendant in a civil action can testify in his own behalf. Proceedings supplemental to execution have taken the place of equitable *fi. fas.* and other suits to discover assets of dishonest debtors.

We sympathize with our forefathers in their fears of judicial tyranny and appreciate the safeguards which they threw around an accused person, but it would seem that they sometimes exceeded the bounds of caution. Take the first case in this Court. It may be found in 3 Murphey, at page 1 (*State v. Jim*). It seems that one Jim, a slave, was indicted for breaking into a dwelling-house with intent to steal a bank note. The indictment concluded most fortunately for the aforesaid Jim, "contrary to the form of the *statute* in such case made and provided." Now at that time there happened to be two statutes regulating the larceny of bank notes. The bill, therefore, was quashed and a new trial granted because it concluded in the singular "contrary to the form of the statute" in such cases made and provided, instead of in the plural "contrary to the form of the statutes" in such cases made and provided. "The defendant is by this indictment," said the Court, "referred to one statute. Which shall he examine to prepare his defense? Whilst he is preparing his defense under one law, the prosecutor is arranging the charge under another, and by the perplexity thus occasioned an innocent man may be surprised into a conviction."

There has been progress since *State v. Jim!* Indictments, and specially those for murder and perjury, have been much simplified and shortened. They need not conclude against the form of the statute or statutes at all. It is not necessary to give the exact date of the alleged offense or the exact amount alleged to have been stolen. Our statutes of jeofails have wisely cured all these trivialities. The accused person may testify in his own behalf, and when the guilty party is finally convicted the sentence is executed under an order of the Governor, without awaiting the next term of court.

Death by electrocution has been substituted for hanging and corporal punishment has been abolished. The number of capital felonies has been reduced from a round dozen or more to four. Murder has been divided into first and second degree—first degree being that accomplished by premeditation, deliberation, and willfulness, such as burning, poisoning, torturing and lying in wait. Burglary has been divided into two degrees, it being now punishable with death only when the felony is committed in the night-time, in a dwelling, actually occupied, and the same as to arson. We no longer imprison children in the State's Prison or the jails; we commit them to the boys' reformatory or training school. And perhaps the most salutary change in the treatment of prisoners relates to their life in prison. The humane spirit of the day demands clean and well-ventilated jails and county homes, wholesome food and good clothing, various forms of diversion, rewards for good conduct, a division of the unfortunates into three classes—one called the Honor Class—and some compensation, but not yet enough for work performed. One visit more from Mrs. Ballington Booth, sister to the man "within closed walls," with her large sympathy and moving eloquence, and Jack Mills himself would be pleased with our prison conditions, I am sure. To Dorothy Dix and James C. Dobbin we are largely indebted for our first hospital for the insane, and this was followed by other like hospitals and by hospitals for the deaf, dumb and blind, the tubercular, the feeble-minded, and homes for orphans, a total of more than five thousands of these unfortunates now having the tender care of the State.

REMEDIAL STATUTES—THE CODE.

Statutes of a general character have also been passed to facilitate the administration of justice. Statutes have no roots, we are taught, but judicial decisions are seldom without them. And yet, behind many a remedial statute is some dissent of a virile minority, or some impossible situation into which the law has been thrown by an ill-considered decision. There may be, and often is, a long struggle between the forces of reaction and of progress, but the end may be seen from the beginning. Take, for example, the opinion of Lord Abinger, Sir James Scarlett, England's greatest advocate, in the case of *Priestly v. Fowler,* holding that the master is not liable for the negligence of a fellow-servant. It took three-fourths of a century to reverse this wrong to society. It furnishes, says the Ohio Court, one of many instances of how little some of the most shining talents of the advocate appear to prepare their possessor for the office of judge. The first fellow-servant decision in this State was *Ponton v. R. R.*, and it followed the English decision. This doctrine of fellow-servant was abolished by statute in North Carolina not until the year 1897.

Perhaps the wisest of these remedial statutes is the Connor Act of 1885, requiring all deeds to be registered, and practically placing an unregistered deed on a footing with an unregistered mortgage. Prior to said act, no one could with safety make a loan on North Carolina lands, and foreign capital avoided the State.

Because of such decisions as *Busbee v. Commissioners,* declaring that an action to remove cloud from title to land would not lie if the complaint alleged that the said claim was invalid ("what is the necessity for the suit, then, if the claim is not good," said the Court, and dismissed the action), the Jacob Battle Act was passed, and now any person, whether in or out of possession, can bring a party into court claiming an interest in land and contest his claim and remove the cloud. If one makes obligation to convey land and afterwards dies his executor or administrator, after the obligation is registered and upon receipt of the purchase money, may execute a valid deed to the obligee.

You may now join in one suit a cause of action for debt, or on account, or for tort, and in the same action attack defendant's fraudulent deed executed to avoid paying his just obligations. Great progress has been made in retaining jurisdiction of causes, if the court to which the appeal has been taken has jurisdiction, although the court in which the litigation originated had no jurisdiction. Amendments to pleadings and to records, even in this Court, are liberally allowed in the interest of substantial justice.

Napoleon was no doubt the most versatile of the children of men. He reformed everything—war, finance, arts, government, religion, and the law. On his Code Napoleon his fame rests secure. To simplify and perfect the law has been the labor of mankind from Lycurgus to David Dudley Field and Roscoe Pound. The problem is how to so simplify the law as to avoid technicalities and delays and yet preserve personal and property rights. This great task has had the attention of this Court and of this Association and much free advice has been offered by enthusiastic reformers both on and off the bench. I submit, with becoming diffidence, that *the only remedy is the trial judge.* Continuances are too easy, cross-examinations too prolix, and speeches too long—and these are evils the trial judge can correct. There are no delays in this our Supreme Court. With each recurring first Tuesday in February and last Tuesday in August, as that faithful old timepiece ticks out its ten of the o'clock, a brand new bill of fare, *a la carte,* is ready for the expectant brethren whose speeches of three-hours length, cut to thirty minutes under Rule 33, come forth under high pressure.

It is the sense of the lawyers of this State generally, I think, that the Code of Civil Procedure, together with the amendments, under the liberal construction of this Court, gives the framework for the speedy and

safe dispatch of the business of courts. The Code of Civil Procedure is an improvement on common-law pleading and practice, as cases are now tried on their merits and upon the main issue. The Code may not be so accurate or scientific as common-law practice, and undoubtedly it gives this Court great leeway to affirm or reverse in the interest of substantial justice without doing violence to any well-recognized legal principle. Adopted at the end of the Civil War, brought to this State by carpet-baggers and scalawags against the wish of bench and bar, the fact that it is still with us is the best evidence of its worth. It is rarely the case that a new trial is granted because of a mistaken remedy under the Code. If one is in doubt as to whether he will bring an independent action or make a motion in the original cause, he simply does both and then consolidates. I have examined the last volume of our Reports and find that no new trial is therein granted because of error in pleadings. Judge Dillard while a member of this Court was in doubt as to whether he should accept the degree of LL.D. from the University, because he did not know whether old Mybra Gulley should have brought an independent action or moved in the cause! If this is the only obstacle to such honors we should now have many learned doctors in our midst. Much delay would be avoided if a three-fourths or four-fifths verdict were allowed in civil cases. The Legislature of 1919 will do the State some service if it shall break away from this fetish of a unanimous verdict. It seems strange that in a republic where the majority rule and rule supreme, and with the delays and wastage of hung juries, we should still require all twelve jurors in civil cases to be of one mind.

The doctrine of harmless error, like a specter, haunts appellants. If the merits are with the appellee, if substantial justice has been done, he may feel reasonably safe; but if an act of injustice can be seen in the record, well may he tremble—the slightest error will undo him. The tragedy of the law is when some appellate court, in the interest of supposed innocence or to suppress a supposed fraud, wanders from the beaten legal path and at the same time fails to discover on which side justice really lies. Failing to set forth in the record what the excluded answer to the obnoxious question would have been is the lion in the pathway of new trials if substantial justice has been done; but if injustice has been enacted into law, this usually benign and sleeping principle awakens into life. "*Quacunque via data*," justice is done, "*Fiat justitia ruat coelum.*" Sometimes the trial judge excludes a mass of incompetent evidence, and afterwards in arraying the contentions to the jury repeats such excluded evidence. It is exasperating to hear the appellate court say in a cold manner that they do not grant new trials because of error of the judge in arraying evidence. In addition to the

codification of our Civil Procedure, we have codified most wisely the law of "Negotiable Instruments," "Corporations," "Partnerships," and "Executors and Administrators."

To be a judge satisfactorily to one's self is not, nowadays, an easy task. He should be just and do right and not thwart the intelligent will of the people; but he must not decide so as to make himself ridiculous in the eyes of the judicious and to the delight of the groundlings. To be a judge and yet to so miss the law that impartial law journals and writers hold one's opinion up to merited ridicule, what could be more galling! Of the Chief Justice's opinion in the *Tobacco Cases,* Judge Harlan, in his dissent, declared that it was as sensible and learned as if he had said that black was white and white was black. Sometimes it happens that an error is made in an opinion of the Court, funds are distributed under the erroneous opinion, a petition to rehear is filed and, perforce, denied, and the principle is finally overruled in some other appeal. The point first decided, and then reversed, was that the lien of a judgment on the lands of a debtor should be displaced in favor of a junior mortgage.

OTHER STATUTES—COURT PRACTICE.

An examination of the Revisal will disclose that scores of sections have been enacted to fill some gap in the law, to meet some knotty problem, or to resolve a doubtful construction. One wise statute, as Professor Mordecai in his Lectures remarks, is worth a dozen decisions of the Court. For example, our betterment statute, in some cases, takes the place of a vendor's lien; the question which puzzled the Washington Supreme Court, "Is a husband who kills his wife entitled to the insurance on her life?" is put at rest by a statute denying such right; nor is a divorced person entitled to any portion of the estate of the spouse. Ungathered crops of a decedent belong to the personal representative and shall not pass to the widow under a will. The appointment of a person as executor shall not discharge a debt due by him to the estate; heirs shall be jointly and not severally liable for the debts of their ancestor, but not beyond the property acquired. Lord Campbell's Act, giving a suit for death by wrongful act, is a part of our jurisprudence and is most liberally construed. In many States the Employers' Compensation Act has superseded this statute. All doubt as to the legal status of illegitimates and half-blood and after-born children has been removed by statute; and wise provision has been made to supply lost or burnt records or to make easy proof of the same. Curative statutes relating to defective probates and registration of conveyances have served a useful purpose in strengthening and preserving titles to real estate; and the actual

possession of land for a short time under color, or for a longer time without color, ripening such possession into a legal title, has been wisely provided. Ours is the only State requiring a greater length of time to ripen title by adverse possession as between tenants in common than between strangers. Our registration laws meet the requirements of the Federal Reserve system, and much money has been invested therein on the easy amortization plan to persons actually engaged in agriculture. Time, which is silently pulling down and destroying the handiwork of man, is just as surely building up the title to his real estate in possession. Legacies which formerly lapsed if the legatee predeceased the testator are now preserved in the lineal line. The attempt to cure by statute defects in deeds because of vagueness of description has naturally proven abortive. The statute of frauds requires all contracts relating to land to be reduced to writing; and if the deed is lacking in an essential element, no statute can supply the defect. Stocks of goods may not be sold in bulk except upon notice to all creditors; and assignments for the benefit of creditors are safeguarded, the assignor being required to file his list of creditors and make due report to the clerk of the Superior Court. Suits for libel and slander are of ancient origin. The absurd ruling that "The greater the truth the greater the libel" has long since gone to limbo, and almost anything pertinent to the controversy, even rumors, will be admitted in mitigation of damages. Seisin, which gave the old courts much trouble to define and apply, has been defined by statute to be any right, title or interest in the inheritance. This has been construed to enable the husband to inherit from his deceased child, leaving no brother or sister or descendants of such, and though there may be an outstanding estate by the curtesy or for life and although the husband was not of the blood of the ancestor from whom such child inherits. That is to say, the husband is seized of the inheritance despite an outstanding particular life estate. But one is not entitled to a homestead, or to dower, in a remainder.

ATTITUDE OF COURTS TO STATUTES.

Let us now consider the attitude of this Court towards the work of the lawmakers. Has this Court heard the voice of the people? The late Col. Tazewell Hargrove used to tell the story of an old man who lay dying. His two sons, one weak-minded, having been called to his bedside, he said, "My dear boys, to Thomas I am going to leave the bulk of my fortune, and I will appoint you, Richard, his trustee." "Father," said the weak-minded youth, "won't you give Dick the bulk of the estate and make me *his trustee?*"

We recall that Jefferson wrote to Roane, "If the judges have the

power to annul statutes in conflict with the Constitution, then the Constitution and laws are a mere thing of wax which they may twist and shape into any form they please." The power of courts so to do has been disputed at all times. North Carolina, though "the freest of the free," was a pioneer in upholding such power. In 1787 the highest Court in this State declared an act of the Legislature unconstitutional and void, Judge Iredell upholding the power and Governor Richard Dobbs Speight championing the opposition. Iredell addressed an open letter to Speight, which text-writers pronounce the ablest and most complete exposition of the power of the judiciary over unconstitutional legislation which had appeared in the whole literature on the subject. Governor Speight maintained that the judiciary had usurped all the functions of government. Judge Iredell replied that when a judge took an oath to support the Constitution, this oath ought to bind him, and that if an act of the Legislature conflicted with the Constitution, to sustain it would be to do violence not only to the Constitution but to the oath he had taken.

The members of this Court, at its organization in January, 1819, were of the Iredell school of thought. Chief Justice Taylor and Judge Hall were graduates of William and Mary College, the college of John Marshall, with whom they, as well as Judge Henderson, the ablest judge on the bench, were in full accord. They maintained that it is the duty of a judge to exercise his judgment, and not his will, and that judges should be free and independent.

We read in John Quincy Adams' Diary a remark of Senator Giles of Virginia, that he and men of the Jefferson school treated with the utmost contempt this idea of an independent judiciary.

In a few months after this Court was organized, the epoch-making opinion of Marshall in the *Dartmouth College case* was delivered, holding that the charter of a college was a contract which the Legislature of New Hampshire had no right to alter in any material respect without the consent of the trustees. It may be remarked that Justice Gabriel Duvall, without writing a word, dissented himself into immortality.

North Carolina was soon confronted with a similar question in the famous case of *Hoke against Henderson*. The question here presented was whether an office is the private property of a citizen. This Court held that it was, and that he could be deprived of it only by the law of the land. *Hoke against Henderson* was not reversed until early in the present century, when it was held that an office is not based on contract, but is held by right of tenure and is subject to the control of the Legislature. Many vigorous dissents were filed before this consummation came about. When courts cease to be farseeing and give utterance to doctrines opposed to orderly and natural progress and development,

as in the *Dartmouth College case,* the *Dred Scott* decision, the *Income Tax cases,* they invite attack. It is to be wished that judges may so administer the important trust committed to them, with an eye not only to precedent but to manifest destiny, to things not of today or tomorrow but of a hundred years hence, that further attacks upon the system of which they are exponents will not be made.

The doctrine of the recall of judicial decisions is so humiliating to an honest-minded judge that an office held subject to such thralldom would have as little of honor as of emolument. Our judges were first appointed by the Crown, afterwards by the Executive (together with the Council of State), then by the Legislature, and since 1868 they have been elected by the people. In some States the final plunge has been made and judges and their opinions are subject to popular recall. What a commentary upon the fickleness and instability of the people or upon the narrowness of the courts! The dignity of our judiciary has been upheld because the courts have usually, in the first instance, planted themselves upon the immutable principles of justice and right, having due regard to the rights of property and of the individual.

DECISIONS: WISE AND OTHERWISE.

It was early held that a corporation, to which had been granted a charter to operate a ferry or maintain a bridge across a river, had no exclusive right to such privilege, and that to so hold would be to create a monopoly, and that other bridges and ferries might be chartered, maintained and operated. Indeed our Court has been careful to vitalize our declaration of rights, that perpetuities and monopolies are contrary to the genius of a free people and ought not to be allowed. For example, the grant to a bank of a perpetual charter with the power of charging any rate of interest that may be agreed upon creates a special privilege and is a monopoly and void. So the grant by the city to a corporation of the exclusive use of its streets for water-works constitutes a monopoly and is void. All attempts to unduly tie up real estate or create perpetuities therein have been wisely thwarted and we adhere to the English rule laid down in *Peter Thelusson's Will case,* a life or lives in being twenty-one years thereafter. For a like reason, the *Rule in Shelley's case* is firmly engrafted into the law of real estate. To give the first taker a fee simple, though the instrument seems to convey to him only a life estate, and to construe the words heirs or heirs of the body of such first taker as words of limitation and not of purchase, puts the lands in the channels of commerce and avoids entails. As our courts have well said, "It is not a rule of construction, it is a rule of tenure, a rule of law." Professor Mordecai in his comprehensive Law Lectures gives this

further reason, "Thou shalt not seethe the kid in its mother's milk. Why not? Because the law forbids it. So with the *Rule in Shelley's case.*"

Courts have had much trouble in giving effect to limitations in deeds or wills dependent upon one dying without heirs or heirs of the body, such limitations being void for remoteness. To meet this difficulty, in 1827, the Legislature enacted that in such cases such words should be interpreted to mean when such person shall die not having such heir or issue or child living at the time of his death. What a tempest has raged around Pearson's great opinion in *Hilliard against Kearney!* This opinion is a half-century ahead of its time and in line with modern thought. It declares that when an estate is defeasible and no time is fixed on at which it is to become absolute, and the property itself is given and not the mere use of it, if there be any intermediate period between the death of the testator and the death of the legatee at which the estate may fairly be considered absolute, that time will be adopted for the reason that while, on the one hand, testators are not apt to have reference to what may happen between the making of the will and their own death, inasmuch as such an event may be provided for by a codicil or another will; on the other, it is highly improbable that they ever mean, after giving the property itself, to make the estate defeasible during the entire lifetime of the legatee and, in effect, give merely the interest or use of it, which is inconsistent with the prior gift of the property and deprives the primary object of bounty of the right ever to exercise full ownership over it—*e. g.,* A gift to A. if he arrives at the age of twenty-one, but if he dies without leaving a child the property is to go to B., the intermediate period is adopted and the gift is absolute at his age of twenty-one.

Since the act of 1827 the doctrine of Hilliard and Kearney no longer applies, it would seem. The mischief to be remedied by this act was to prevent the failure of a remainder to take effect because of remoteness. It only establishes a rule of construction by means of which the second estate could under certain circumstances be validated and upheld, and did not intend to change the nature of the first estate or make the second estate a qualification of the first. To make said act serve the further purpose of absolutely preventing a vesting of the remainder during the lifetime of the testator has created much uncertainty and has tied up estates for the use of unborn generations. We have a very wise statute authorizing the sale of contingent estates in land, and it has been liberally construed. Progress was made at one time in the unfettering of estates by opinions holding that contingencies which impart a present interest of which the future enjoyment was contingent are defeasible and may be the subject of release operating as an estoppel on the heirs

and effectual as a valid conveyance. In one case a father devised to his son certain property and provided that if the son died unmarried or leaving no children the property should go to the testator's brothers or sisters. It was held that the son and the living brothers and sisters of the said testator could make a valid conveyance, and if all the brothers and sisters of the said testator should thereafter die leaving children such last-named children would be estopped by the deed of their ancestors. Of late years there has been a tendency to react from this line of cases.

This Court has not hesitated to strike down acts of the Legislature which manifestly violated the National or State constitutions. For example, a stay law staying the collection of debts was declared void, and an act providing that where an owner of swamp lands fails to pay all taxes levied or which ought to have been levied on or before a certain date, such lands should be forfeited to the State without any judicial proceedings.

The State-wide Highway Law of 1917 failed to have the approval of this Court, but it is confidently expected that in 1919 the lawmakers will enact another statute conforming to the requirements of this Court and giving our State the benefit of the same. North Carolina's climate and scenery and diversity of soil, its stretch from sea to mountains are so fine, that it is little short of a calamity that she shall not have highways alluring pleasure-seekers, like the Trossacks and the Riviera.

A good illustration of the progress of judicial opinion is furnished by the attitude of this Court to Article IX, section 3, of the Constitution, providing for a four-months school term. Twenty-five years ago the case of *Barksdale v. Commissioners* was decided by a divided Court. It was then held that an act of the Legislature authorizing the county commissioners of a county to exceed the limit of taxation provided by Article V, section 1, was unconstitutional and void. The gist of the opinion was that schools were not a necessary expense of the county, and that the equation in taxation must be observed. This was more than a fourth of a century ago. The University had not then become a part of the life of the people; there were no teachers' training schools; the public school teachers were not organized. The people of the State chafed under the *Barksdale decision* until 1908, when *Collie's case* came to the Supreme Court, and upon the same state of facts as in the *Barksdale case*. Barksdale was reversed. The Court simply caught step with the people, and has since held that electric lights for the use of a town or city is a necessary expense. Why not schools also?

In contrast with the *Barksdale decision* is the opinion in a very recent "No-Fence Law" case. It boldly sweeps aside the earlier decisions, upholding the State policy that stock might range where they would, and

that crops, not hogs, should be fenced, and declares "The defendants contend that under the decisions of the Court in *Jones* and *Laws cases* it was held that by the public policy of this State the owners of stock are allowed the privilege of letting them run at large upon the property of others without being liable for damages done by them in such trespasses, and that, on the contrary, the owners of crops are liable for not keeping up fences to prevent trespasses from their neighbor's stock." This loses sight of the fact that these decisions were rendered prior to the war in 1860—fifty-eight years ago—and that in the meantime the public policy of the State as to fences, as evinced by numerous statutes and provisions, is now exactly the contrary.

Statutes authorizing local tax assessments for roads, for drainage, and those regulating prohibition, upholding the jug law, enforcing vaccination, and requiring the signature of the wife and her private examination to a chattle mortgage of the household and kitchen furniture have been liberally construed and upheld. About 1870 this Court refused to give to the Legislature its opinion as to the tenure of office of the members of the General Assembly; three of the judges wrote letters declining for the reason that the Constitution of 1868 made forever separate the three departments of government. Since that time, however, this Court has receded from that position and given its opinion as to the length of the term of office of its own members.

EVIDENCE PROGRESSIVE.

One of the most difficult matters for lawmakers and judges is the law of evidence. Professor Thayer and Justice Holmes say that the law of evidence is the creature of experience, not of logic, and that the dealings of men are not dependent upon mathematical certainty. It was conceived originally that witnesses should always be present, but this was found impracticable and the general rule has become honeycombed with so-called exceptions based, as Wigmore says, on circumstantial guarantee of trustworthiness and necessity. Boundaries, pedigree and expert evidence had been recognized among the leading exceptions to the rule excluding hearsay evidence, such having been admitted from necessity; but there is at the present time an even more liberal tendency, and rules found by the business world to be safe for ordinary transactions have been adopted by the courts which are no longer pedantic, but practical.

The question was early presented in this State, whether a person not an expert could testify to one's mental condition or capacity. Judge Gaston delivered the first opinion, in the *Clary Will Case,* upholding the admissibility of such evidence. Of Judge Gaston's opinion, Redfield says that it was done with great ability, and Wigmore calls it the great

law-making and argument furnishing precedent for the earlier rulings. George E. Badger, our greatest forensic orator, who enjoyed a large practice before the U. S. Supreme Court, was of counsel in the *Clary Will Case*. Evidence of this kind is not designated as expert, but opinion evidence, and the distinction is well marked.

Great progress has been made regulating the proof of handwriting. The old rule of Outlaw and Hurdle, that the jury must hear, and not see, has yielded to the better ruling that all possible light upon this mooted question should be let in. The disputed writing and the admitted, or proven genuine writing, may now be shown to the jury and an expert witness may explain and illustrate his testimony to them and his conclusions and reasons for the same. North Carolina and Louisiana were the only States forbidding the jury to exercise their eyesight in such circumstances.

It has been held competent, in an insurance case, to ask a witness, who had known the insured intimately for months, if he was temperate in the use of liquors. This was held to be neither expert nor opinion evidence, but the statement of a fact. Train sheets made out by a train dispatcher from reports telegraphed to him by a station agent and showing the position of a train at a certain time are admissible, as are daily records kept by a recluse for his own use and showing that it rained on a given day at a given place. The court, not the jury, passes on the question of expert or nonexpert; and a wheelwright, who did not know what was the square root of 49, was admitted as an expert to testify to a question of hydraulics, the question being how much does the withdrawal of so many inches of water from a pond effect the potential capacity of its waterhead.

At first our courts were slow to admit photographs in evidence, but now not only photographs, but messages by telephone, are admitted. The mortuary tables and the charge of the judge upon request may be handed to the jury for their consideration; indeed the conduct of a well-trained dog in following the trail will not be excluded under proper safeguards.

PAROL EVIDENCE—PAROL TRUSTS.

Our courts have a natural desire to do the right thing. This tendency exhibits itself in letting down the bars for parol evidence to vary the terms of a written instrument. When the entire contract has been reduced to writing, and there is no fraud, a relaxation of this rule is regrettable. Moffitt and Maness is the safe rule, as the latest utterances of this Court attest.

Of the Statute of Frauds an English judge remarked that each word was worth a subsidy. Professor Smith says that he is not so sure of

this, though each word has undoubtedly *cost* a subsidy. The Statute of Frauds has been enacted in part only with us. The seventh section, forbidding the creation of parol trusts or confidence of lands, unless manifested or proved by some writing, is not in force. We often wish that it were. The law on the subject is in great confusion. The opinion of Pearson in *Shelton's case* has been departed from and the beneficent provisions of the Statute of Frauds occasionally set at naught. We concede that at common law no writing was necessary either to pass title or to create a trust. The vendor handed to the vendee a clod of dirt and put him in possession in the name of livery of seizin, and a trust could then be engrafted on the land by parol. To say that the failure to enact the clause relating to parol trusts warrants the doctrine that any bargain by word of mouth concerning lands may be enforced because the specious plea of "parol trust" is relied on would seem to beg the question. What is a parol trust? It cannot exist when there is no fiduciary relationship, when neither party has title to the land, and when the party invoking the doctrine has not paid the purchase money. For example, it cannot embrace a loss of a bargain because one party has broken his word and bought at public sale lands which the other party claims the purchaser agreed to buy for him. Is not the safe rule that when there is no well-recognized trust relation between the parties the mere words of the holder of the legal title will not suffice to create such trust?

INNOCENT HOLDER FOR VALUE.

Commercial paper is, of course, the life-blood of trade, not one-hundredth of one per cent of business being based on actual money. When the rule admitting parol evidence is extended to such paper, in the hands of a holder for value, contrary to the well-recognized rules of the law-merchant, is not the life of trade imperiled? Some notes are necessarily dishonored even in the hands of an innocent holder for value and without notice; for example, those tinctured with usury or based on the violation of some statute, such as gambling, and all such notes as fail to comply with the wise provisions of our Negotiable Instrument Act. But when it was declared that a municipal bond was invalid in the hands of an innocent holder because the roll was not called three separate times in the Senate and in the House when the act authorizing the bond issue was on its passage, the credit of the State suffered. The Supreme Court at Washington soon set us right in this matter. Six and eight-cent cotton was pinching us in those days! M. V. Lanier, a great lawyer, dug up this point in the *Oxford Bond Case*. That a note due in two or three years, interest payable semi-annually, is dishonored upon failure to pay the first installment of interest, and that

the party who acquired the same in due course without notice and for full value is not protected was held in an inferior court in New York and afterwards followed in this State, how wisely time will determine. Light and trifling circumstances showing knowledge of the fraud can only be justified where the transaction is of such publicity and extent that the commercial world may be presumed to have notice thereof; for example, the fraudulent sales, up and down the land, of sewing machines, Percheron horses, and the like.

"CYC." AND LIENS.

We thus see that numerous changes have occurred in many departments of the law, particularly adjective law, and that both civil and criminal procedure and practice have been revolutionized. Sanders on Pleading and Evidence, which Chief Justice Smith and my father used to tell me was the *vade mecum* of the common-law lawyer, has given place to "Cyc." and Corpus Juris. Well do I remember with what scorn these black-letter lawyers looked upon the coming out of the Encyclopedia of Law—a mechanical and alphabetical arrangement to supply the place of brains. And the advertisement of such books! How offensive! A great locomotive labeled "Cyc.," like the Bull of Basham, dashing down the track and hurling Story and Fearne and Greenleaf and Sugden and Stephen hither and yon; or else some care-worn attorney, with fingers running through dishevelled hair, and so perplexed until the A. & E. arrived, and then—all smiles! And yet the substantive law has been altered but little these hundred years—real property, wills, contracts, principal and agent, sales, executors and administrators, legacies, bailment, and the right of a citizen to personal liberty and personal security—the law governing all these subjects remains practically the same.

Our Government lives up to the principle that the laborer is worthy of his hire and makes ample provision that his wage shall be secure. The farm laborer has his lien on the crop, ahead of all other liens; the mechanic has his lien on the building; the materialman and subcontractor have their liens; the hotel and boarding-house have their lien on the baggage; the liveryman his lien on the stock; the doctor is preferred as to his services in the last illness of his patient; all classes seem to have some kind of lien except the lawyer, and he comes in only when he is acting as an officer of the court and under its orders and there is a fund created by his efforts and within the custody of the court.

IMPORTANT DECISIONS.

The harsh rule of *Cutter v. Powell* that there can be no recovery upon a *quantum meruit* for breach of an entire contract, though it had been

nearly performed, and the breach is occasioned by the death of the employee, has been greatly modified in the interest of substantial justice. One who contracted to serve for a stated period at so much a year, payable monthly, was held entitled to recover by the month, though he quit his employment before the end of the period.

The greatest good to the greatest number being the law of this Court, if one erect a dam across a floatable stream he must arrange suitable sluiceways for the convenient passage of logs and timber, and a floatable stream is held to be one down which, at ordinary seasons of rainfall, logs may be floated. And again, riparian owners may not materially diminish the flow of a stream by extracting water therefrom and to so deflect such water to the injury of lower riparian owners is actionable; as it is likewise actionable to pollute the water of a stream by allowing raw sewage therein. The watersheds of cities and towns have the fostering aid of the court; the right to pure and wholesome water as it flows down the rivers and streams is rigidly upheld as against the right of parties up the stream to dump raw sewage therein; such latter right being a servient easement.

This Court has yielded wholeheartedly to the doctrine of the police power of the State, the safety of the people being *suprema lex*. Statutes regulating bucket shops, making it presumptive evidence of gambling to purchase any article for future delivery when no immediate delivery takes place, raising presumptions of guilt from the bare possession of a small quantity of spirituous liquors, making the place of delivery the place of sale of spirituous liquors, requiring cities, towns and manufacturing plants to put in sanitary filtration and other appliances to protect watersheds; these and many like statutes have been liberally construed by the Court to the great benefit of the people.

On the question of the constitutionality of a statute which directed the proper official to seize and confiscate fishing nets which were engaged in violating the fishing laws there was a sharp division of the Court, the majority declaring that the statute was valid.

Under the police power, and for the protection of morals, acts have been upheld making it a misdemeanor to use profane and indecent language in public places; forbidding the doing on Sunday of labor, work or business of one's ordinary calling; an act of this kind was, however, declared void which attempted to prohibit, because done on Sunday, work done in private and which did not effect public decency or disturb the religious devotions of others. The Christian religion is no part of the common law, and contracts executed on Sunday have been upheld.

The kindred right of Eminent Domain, the right of governmental agencies to appropriate the property of the citizen for general good, is a favorite of our courts. In a leading case, soon after this Court was

organized, it was held that the General Assembly could acquire not only the easement, but all interest of the individual, the only restriction being that the property must be for public, not for private, uses, and that it must be upon just compensation. The Constitution makes no provision for compensation, but the principle is so grounded in natural equity that it has never been denied to be a part of the law of this State, and such compensation need not precede the taking, so that provision is made that the owner will be surely and ultimately compensated.

CONTEMPT AND PUBLIC-SERVICE CORPORATION.

On the subject of contempt this Court has taken an advanced position, holding that when a trial judge was assaulted in his room at the hotel after court had adjourned for the term, though no formal announcement had been made and such assault was on account of a sentence of the judge during said term, such judge was within his rights in summarily punishing the offender for contempt. It is a matter of interest to the friends of the Secretary of the Navy to know that the U. S. Supreme Court has just affirmed a contempt punishment of a Toledo editor in circumstances almost identical with those which so stirred our State some dozen years ago when Josephus Daniels was heavily fined by Judge Purnell and subsequently released by that brave and loyal son of the State, Judge Jeter C. Pritchard. The vigorous dissent of Justice Holmes in the Toledo case must be the law. It cannot be otherwise in a free republic.

This State and perhaps Texas seem to be the only jurisdictions in which mental anguish is recoverable for a negligent failure to deliver a telegram designated as a death message. Such cases, in their various ramifications, are indeed a puzzle to our courts. Public-service corporations have been held liable in damages, actual and compensatory, for the violation of contracts with the public, and such damages may likewise embrace any humiliation or disgrace thereby occasioned. And we are one of the few States permitting an injured party to sue into a water contract made by a water company with a city and guaranteeing flow and pressure of water sufficient for domestic and fire purposes, which contract had been broken by the company with resulting injury.

NEGLIGENCE MASTER AND SERVANT.

No branch of the law has undergone greater change than the law of negligence, particularly as between master and servant. Has not the time about come in America, as it has actually come in England, when a servant engaged in complicated work must be compensated for injuries occurring while in the performance of duty, though the master be not

negligent? Society is so complicated and the proper relation of man to man such that the stronger must bear the burdens of the weaker. With the abolition of the fellow-servant rule and of the assumption of risk a long step forward was taken; and though we have no employers' compensation act, this Court has been at all times liberal and astute to discover evidence of negligence. Thus it is negligence in the master not to instruct a green hand working with complicated machinery. The failing to promulgate reasonably safe rules for doing work, in such cases, is likewise negligent; and so is the failure, periodically, to inspect elevators and other dangerous appliances. The duty of the master to furnish safe appliances, a safe place, and to make reasonably safe rules for the servant is enforced with vigor. At one time, under the catch phrase "the continuous negligent omission of duty," it seemed that the servant might recover for the negligence of the master who failed in this primary duty, although the servant was himself guilty of contributory negligence. But, at the first opportunity, this was reversed and it was held not true as an abstract proposition that the defense of contributory negligence is not available to the defendant in such cases. If the injured party is negligent (except when engaged in railroading, which is now regulated by a statute conforming to the Federal statute), and such negligence is the proximate cause of his injury, he is barred. The employee of a manufacturing plant assumes all risks incident to his employment, except as to defective appliances, which he does not assume unless the defect is so obviously dangerous that no prudent man would continue to work and incur the risks. If an infant under the statutory age is employed in a factory and is injured, the employer is liable, although the infant was not at the time in the actual line of his work. So the owner of a railroad is liable for the negligence of its lessee in operating the road.

The doctrine of the last clear chance (Davies and Mann) has been adopted by our courts. So far has this been carried that it is really an advantage to the cause of the plaintiff that his intestate was drunk and down on the track when killed, because the engineer could have discovered his peril the more readily. It is negligence not to stop the train for one that could be seen by the engineer on a trestle or bridge, or for an infant. This rule was, however, not adopted without a stiff dissent. It is not negligence not to stop the train for a person walking on the track and apparently in possession of his faculties. It is presumed that he will get off, and this presumption protects the railroad until the moment of impact. Such holdings as *Smith v. Railroad,* that one riding in a passenger coach attached to a freight train and standing up between the seats was thereby guilty of such contributory negligence that he

could not recover damages if injured by the negligent jerking of the train sounds harsh a third of a century later.

"Upon the whole," says Professor Mordecai, "I take it that we may consider the law of this State now to be: That the principal is liable for the negligence, unskillfulness, frauds, trespasses and torts of his agent, although such trespasses and torts be willful, wanton and malicious; provided they be done either by the direction, assent or authority of the principal, or are subsequently ratified by him, or are committed by the agent in the prosecution of the principal's business or within the scope of such agent's employment in the discharge of duties assigned to him and while in the discharge thereof; or it seems, if the act be done with the belief that it will benefit the principal and with the intention to advance his interests, and that this applies alike to individuals and corporations, although the distinctions between individuals and corporations and between different classes of corporations heretofore pointed out may exist. If the wrongful act of the employee be wanton and malicious, only compensatory damages will be allowed, even against railroads. Railroad corporations are liable for injury, insult, violence and ill-treatment to passengers inflicted by their employees, though such injuries be the result of the willful and malicious act of an employee, and although the employee acted in consequence of charges made against him and epithets applied to him by the passenger such as no good man would deserve and no brave man would submit to."

CHIEF JUSTICE RUFFIN—EQUITY.

When this Court was organized there were no text-books or treatises of value on the subject of Equity. Blackstone devotes less than twenty pages of his commentaries to it. The fame of our great Chief Justice Ruffin rests for all time upon his comprehensive grasp of this subject. He blazed the way, and his fame is greater as time passes—of him and of Lemuel Shaw, Chief Justice of Massachusetts, and of John Gibson, Chief Justice of Pennsylvania, and of Charles Doe, Chief Justice of New Hampshire, Professor Pound, Dean of the Harvard Law School, declares that they are the greatest judges that have adorned a State bench.

NEGRO LEGISLATION.

If I could I would let this occasion pass without a discordant note; but he is a false prophet who speaks only smooth things. From John Morley's Diary of September 1, 1910, I read: "Today Booker Washington comes to Skibo, where I am staying, being a great friend of my host's. I had talks with him when I was in America, six years ago. The future of the negro in the United States has always profoundly in-

terested and excited me, as well it might. What will their numbers amount to twenty or fifty years hence? Terrible to think of it! Talk of India and other insoluble problems of great states, I declare the American negro often strikes me as the hardest of them all."

These words were spoken by a friend of America, a careful and wise statesman, a liberal and an optimist. Shall we take them to heart? So long had England shut her ears to Ireland's plea that when her day of trial came (July 31, 1914) hundreds of thousands of British soldiers were required to guard other hundreds of thousands of discontented Irishmen, more than a million men remaining inactive while the pillars of civilization were being torn away. Had the great war broken out in the days of Populism, when the negro was contending for his rights, what would have been the consequences! And when another war shall come and the negro is smarting under the servitude in which an inexorable fate has placed him and must keep him, God pity us of the South.

We do not apologize for, nor would we undo, one piece of North Carolina legislation affecting the negro. The constitutional amendment taking away his vote is necessary, and so are the laws separating whites and blacks *toto coelo* in railroad trains, street cars, theaters, and other public places. If two races occupy the same country on an equality, the end has always been amalgamation. Ethnologists say that this will be our fate. I do not think so. The last sixty years have deepened the instinct of race prejudice and the danger lies another way. Even in this calm and judicial presence, let me say that as things now stand, the alternatives are: amalgamation, extermination, emigration, or servitude. I have my views, but this is neither the time nor place to promulgate them.

SIDELIGHTS ON THIS COURT, ETC.

There are some sidelights on the legal and legislative history of the last hundred years that may be of interest. One of the most noted dissents, considering the personal consequences, is Pearson's, in *Spruill v. Leary,* the dissenting opinion becoming the law in *Myers v. Craig.* The point as at first decided was that collateral warranty barred the heirs of the warrantor and those claiming under him—really too dry a subject to have caused any unpleasantness between the two eminent Chief Justices. The earnest dissent of Ruffin in *Wiswall against Brinson,* that if a landowner was answerable in damages for negligence of one employed to move a house, the whole of life would fall into the relationship of master and servant, profoundly impressed the older lawyers and has been quoted in Westminster Hall. Rodman's dissent in *Long v. Long* no doubt changed the law in divorce matters, bringing about section 1561 (4) of the Revisal. The humane dissent of Battle changed

the rule excluding threats of the deceased communicated to the prisoner. The dissent of Merrimon in the *Barksdale case* disclosed his larger vision. Bynum's dissent in the North Carolina lease matter gave him merited fame; as did the dissent of the present Chief Justice in the *Office Holding Cases;* and his dissenting opinions in the matter of contracts of married women and of the homestead led up, respectively, to the Martin Act, which allows the wife to contract without the joinder of her husband, and to such a change in the law of homestead that when a homestead is now sold it ceases to be exempt in the hands of the purchaser. Iredell's dissent in *Chisholm v. Georgia,* as is well known, brought about the Eleventh Amendment of the Constitution. Bartholomew F. Moore's brief in *State v. Will,* a slave, is one of the most impressive documents on file. It may be found in Peele's *Distinguished North Carolinians.* It advocated the right of a slave to slay his master in self-defense, and saved his life. The most important civil cause, considering the length of the trial, the amount involved, the ability of the attorneys engaged, the prominence of the trial judge and of the suitors and witnesses, is the *Johnson Will Case.* It is in a class to itself. The cause which aroused most bitterness, dividing a great denomination, and coming four times to this Court, was *Gattis and Kilgo.* The decisions in the *Alsbrook case,* putting the W. & W. R. R. on the tax books, though exempted from taxation by charter; and in the *Selma Connection case,* requiring the railroad to make convenient connection with Raleigh, were affirmed by the U. S. Supreme Court and are far-reaching and progressive in sweep and novelty. The most exciting and dramatic criminal cause was *State v. Boyle.*

Prior to the Sixty-third Reports, no writ of error had gone from this Court to the Supreme Court at Washington. Since then fifty-nine writs of error have been disposed of by said Court, with the following results:

Dismissed	17
Affirmed	20
Reversed	22
	59

Affirmances, 47 per cent of appeals. This Court, disregarding Chief Justice Bleckley's caution that a Court reverse all errors except its own, has overruled itself one hundred and seventy times in a hundred years. The longest term of service on this bench is that of the present Chief Justice—thirty years; next in length of service come Pearson and Ruffin, twenty-nine years and ten days and twenty-five years each, respectively. The longest term of service on the Superior Court bench

was John M. Dick's twenty-seven years. Judge Oliver H. Allen, now of our Superior Court bench, is a veteran of twenty-one years service. Of the olden day, the legislator having the longest service was Joseph Riddick of Gates—twenty-nine years in the House and four years in the Senate—thirty-three in all; and Harry W. Stubbs of Martin has to his credit a longer legislative record than any living man—twenty-four years in Senate and House. *Amicus Curiæ* of this Court, for years and years, was Patrick Henry Winston, Sr., whose argument won *Cloud v. Webb*, and to whom Pearson pays high tribute in *Day v. Howard*.

APOSTROPHE TO JUDGES.

The task which the partiality of my brethren has assigned me is now completed. Patriotic duties to our country, before the great war ended and since, and a busy professional life, made more onerous by the absence of a son, now a captain in that war, have prevented a more comprehensive review of this interesting subject. Sometimes when friends have gathered around the fireside in a sister State I have heard those who have made a study of North Carolina remark, "You North Carolina folks have a great way of knowing one another; you seem to be one big family." And so we are, both as to the quick and the dead. And the spirit of the departed, who wrought and labored in these halls, and many of whom look down upon us from these walls, seems to be about us on this interesting occasion—Taylor, the Mansfield of the bench; the strong-minded Henderson; the well-furnished Hall and Daniel; Ruffin, the stern and clear-minded prophet; Gaston, the man of righteousness; the courtly Toomer; the profound Nash; the dependable Battle; the versatile and original Pearson; the accomplished Manly; Reade, the caustic logician; Smith, the well-versed jurist; Bynum, Rodman, and Boyden, profound students of the law; Dick, the belle-letter scholar; the slow but safe Faircloth; Settle, the statesman; Ashe, every inch the judge; Dillard, the sweet-spirited dispenser of justice and equity; Merrimon, the free lance; Ruffin, Jr., a terror to frauds and shams; honest Joe Davis; the imperious Avery; the erudite and discriminating Shepherd; the incisive MacRae; the well-rounded Burwell; the rugged Furches; the lovable Cook; and the legal idealist, Douglass, and their successors surviving—all, all, are in this presence today.

The mariner of old said to Neptune, in a great tempest: "O God! thou mayest save me if thou wilt, or if thou wilt thou mayest destroy me; but whether or no, I will steer my rudder true." Through sunshine and shadow, these hundred eventful years, this, too, has been the prayer of North Carolina judges.

Mr. President and gentlemen of the Supreme Court, North Carolina has a right to our love and pride. "Behold her and judge for yourselves."

SOME AUTHORITIES AND COMMENT.

To preserve something of the flavor of our law and for benefit of younger brethren, let me append:

Lord Denman's Act (see Rev., 1628) allows defendant in civil action to testify, passed in 1866; in criminal cases defendant allowed to testify in 1881. Lord Campbell's Act, recovery for death by wrongful act, Rev., sec. 59.

Important statutes and decisions relating to real estate: Act of 1827, construes contingent limitations, Rev., 1851; act of 1903 authorizes sale of contingent interests, Rev., 1590; act defining seisin ("Asa Biggs Act"), Rev., 1556, Rule 12; act 1879, making deed fee simple without word "heirs," Rev., 946; act 1885, Connor Act, requiring registration of all deeds, Rev., 980; act 1891, to cure vagueness of description, Rev., 948; act 1893, quieting title, Jacob Battle Act, Rev., 1589.

Perhaps greatest legal battles have waged around act 1827: *Hilliard v. Kearney*, 45—221, leading case before act; since act, Shepherd's great opinion, *Starnes v. Hill*, 112—1; 134—24; 165—20. Martin Act, Laws 1911, ch. 109; Fellow-servant Statute, Rev., 2646; Laws 1897, ch. 56; acts abolishing contributory negligence and assumption of risk, Laws 1913, ch. 6; 1915, ch. 356. Judge Asa Biggs lost *Lawrence v. Pitt*, 46—352 (a life estate depriving his client of seisin); next session, he being a member, the Legislature defined seisin to be any interest in freehold. The common-law definition of seisin would seem to deprive one of homestead in remainder or reversion, 87—79; and widow would have no dower therein, 90—189. *Dos de dote!* Act quieting title is liberally construed, 154—157; 151—615; 173—525. The contingent remainder act is constitutional and a favorite, 142—154; 165—64; 132—549; fountain-head of doctrine, *Ex Parte Dodd*, 62—97; act of 1879, "Heirs" statute, liberally construed, 133—5; prior to statute, see *Vickers v. Leigh*, 104—257, title to large part of Durham City confirmed by labors of W. W. Fuller.

Safe rule governing parol trust, *Shelton's case*, 58—292; 64—772; *contra*, 151—26. Evidence progressive, 145—385; 147—564; 138—337. *Outlaw v. Hurdle*, 46—150. *Clary Will Case*, 24—78.

Negotiable Instrument Act, Rev., ch. 54, resolves scores of doubtful points governing bills, etc. (not sufficiently studied by the profession). *Farthing v. Dark*, 109—291, dangerous doctrine, subsequently overruled; *do.*, 153—475. Recovery on special contracts: *Cutter v. Powell*, an

English case; doctrine repudiated: *Gorman v. Bellemy,* 82—497; 95—98. *Leak v. Gay,* 107—468, overruled in *Thornton v. Vanstory,* 113—196 (after funds distributed in former case). *Cheek v. Walker,* 138-446, upholding a deed by contingent remainderman and his "living" heirs, has lost favor with the Court in some recent decisions. Rights of riparian owners in floatable stream, 116—731. Judges giving opinions as to term of office, 64—785.

Burke's "Reflections on French Revolution."
Connor, R. D. W., "Ante-bellum Builders of North Carolina."
Bryce's "American Commonwealths."
Blackstone, Vol. I, Feudal System.
Sprunt's "Chronicles of the Cape Fear."
Battle's History of the Supreme Court, 103 N. C. Reports.
Morley's Recollections.
Connor & Cheshire's "North Carolina Constitution."
Mordecai's Law Lectures.
"Two Centuries Growth of American Law."

THE SUPREME COURT OF THE FUTURE.

HON. T. T. HICKS.

Mr. President, Ladies and Gentlemen:

The time that is past and the time to come are equal in length and are separated by the moment we call the present. We know so much more of the past than of the future that it will require much less time to predict than to narrate.

While Sir Walter Raleigh was confined in the Tower of London awaiting execution, and writing his History of the World, he saw from his window an affray in the courtyard below, which ended in the stabbing and killing of a man. Talking of the occurrence afterward to the governor of the prison, Sir Walter was surprised to find that all his ideas as to what happened, all his deductions from what he had seen, were utterly at variance with the facts. "Alas!" sighed the world-famous man, "If I am so inaccurate as to what passes before my eyes, how can I hope to be accurate in the 'History of the World' I am writing?"

For the last hundred years the lawyers of North Carolina, with abso-

lute knowledge of the facts, have puzzled their brains to determine in advance what the Supreme Court would do in each of the thousands of cases that have been before it. A large majority of them have proven to be false prophets, for has not one side nearly always lost? And have we not often not only lost cases that we expected to gain, but also gained cases that we expected to lose?

The public policy of the State in the last hundred years has changed from within, or been changed from without, in many vital particulars. Yet the Bar Association, "by and with the advice and consent" of the Court, has directed me to foretell what kind of a Supreme Court will sit in North Carolina, with what duties and authority, and what it will do in the hundred years beginning this 4 January, 1919.

In the performance of this task I have invoked the spirit of prophecy, and it is upon me: not any supernatural visitation. I have and use no "Thus saith the Lord" to give weight to my words. No delphic oracle inspires my tongue with ambiguous speech, made to fit in with what may hereafter occur. Neither have I donned the time-annihilating hat of Herr Teufelsdrock to enable me to see and exhibit the conditions that shall be.

If I miss the mark of my high calling, some of you are no doubt wise enough to know it today, but you will not file dissenting opinions. For this occasion I have the only authoritative record guess as to this Court's future. If the sequel proves me to be a false prophet, none of you or of those now living will be here to witness my failure at the *fin de siecle*.

Modern vaticination takes its cue from Patrick Henry's famous interrogation: "How shall we judge the future except by the past?"

My success upon this historic occasion will depend upon whether I have rightly interpreted the nature of our foundations, and the meaning and quality of the structure already begun and in course of erection, known as North Carolina.

One must understand what has been and what is, to be able to determine with reasonable probability what will be. Would that I might be able to interpret truly, through the eyes of the present, by the light of our past, the hopes of the future, in such manner as to assist to some extent at least in the realization of the State's high aim to produce and maintain a happy, prosperous and progressive commonwealth, whose brightest ornaments shall be the magistrates who will minister continually in this its great temple of justice.

The unknown quantities in the problem to be solved are how much health, wealth, common sense and culture the people of this State will have in the next hundred years. Great States have great courts and great men to preside in them and interpret greatly their purposes and their laws. Since law is the perfection of reason, the progress and

power to be attained by the administrators of the law in the years to come will depend upon the development of the character, intelligence, good sense and reasoning faculties of the people. Like people like priests. Like lawyers like courts.

Until the year 1868 the dead hand of the past held us fast. In that year first, by what means you all do know full well and against what opposition it became and has since been an indictable misdemeanor for the county commissioners to fail to provide at the public charge a free public school for four months in every year within convenient distance of all the youth of the State. The effect of this law upon the State has been greater and better than any other single mandate or influence in the last fifty years. With the exceptions of the abolition of slavery and the sale of whiskey, it was the greatest legal event since the keels of Amidas and Barlow first grated upon our sands.

When our Supreme Court was just fifty years old "Free Public Schools" came for all and for all time. As this Court reached its century mark, the mighty people, without a single appeal from the hustings, voted almost unanimously to extend, by taxation, the annual school term to six months. After waiting forty-five years, the Legislature acquired the courage to put into operation the provisions of article 9, section 15, of the Constitution of 1868, compelling school attendance of all children of sufficient mental and physical ability. These schools and the instruction in hygiene required by the law have and will undoubtedly discover many sound minds in sound bodies to whose eyes "Knowledge her ample pages, rich with the spoils of time, will sure unroll," developing men and women capable of supplying all the great needs of the great State.

If "all things are possible to him that believeth," all things are probable, yea, reasonably certain, to him that knoweth.

The Supreme Court of the State starts its second century freed from the incubus of having to try the titles to admit human beings, the administration of corporeal punishment and the determination of the sizes of the switches with which husbands may castigate and flagellate their wives. It starts with the pleasing prospect that it will construe but few more instruments exemplified with the *signum* of the holy cross instead of the sign manual; and that in this cycle the superstitution will disappear that truth will more probably be uttered if the lips of the utterer be first brought in contact with a book. And this great Court's prospects of great power and usefulness are greatly enhanced by the fact that from and after the first decade of its second century, the right to vote and hold office will no more depend upon the sex of the citizen than the duties of earning a living and paying taxes have depended upon sex in the last thousand years.

Many good people among us who know more than your prophet on

many subjects think woman suffrage "the abomination of desolation which was spoken of by Daniel the prophet." They seem to think women voters and officeholders will wear spurs and big black beards; will let all the babies die; will cease to bear children, keep house and make home attractive, and will devote their time to politics, mostly "of the ward type." These prophets of evil have another think coming. They will see the electorate greatly improved and its quality reflected in all the offices. I once rode in a buggy sixteen miles with a sixteen-years-old boy. Just before reaching the end of the journey he broke a long silence to ask me: "How many men's words does it take to overcome one woman's word in court?" I believe that this great reform will cause battles between men and women in courts to be fought on more nearly equal terms. Who can doubt that the average son will have more balance, judgment, and *viridus vis animi,* when the average mother extends the sphere of her thinking from "the washing of cups and pots," sweeping and picking chickens, to questions of statecraft, taxation, the police power, the tariff, finance, and the freedom of the seas? Instead of the exercise of the suffrage dragging women down it will enable her to drag the State up.

Some politicians have cause to oppose woman suffrage, because it will answer for them the prayer of the Psalmist: "Make me to know mine end and the measure of my days."

Our Supreme Court will in the years to come cease to be annoyed with such questions as who is the owner of a window sash worth a dollar and fifty cents; or whether a chattel mortgage for twenty dollars on an old mule may be given in evidence since it was not listed for taxation as a solvent credit.

I am of the opinion, upon the principle *"de minimis non curat lex,"* that no case will be appealable to the Supreme Court of the future unless it involves more than a hundred dollars value. This would certainly discourage litigation about trifling matters that "cost more than they come to"; encourage people in their efforts to adjust small differences, and give the Court more time to devote to "the weightier matters of truth and judgment."

The Supreme Court will not much longer have the authority or the painful duty to declare that a human being shall be put to death by law in North Carolina. Revenge in the law will give place to reform. Will the borders of our fair State fifty years hence contain a single man, not to say a majority, who will admit that he or they are willing to be influenced in a matter of life and death by a spirit of vengeance or retaliation? Will not the conscientious men and women who meet to celebrate the next centennial of this Court blush, as they turn these pages, to think that their ancestors in 1919 condemned human beings to death by

law in North Carolina? In this, if in nothing else, may they honor me as "the prophet of the coming time."

Is it true that "the cure for the ills of a democracy is more democracy?" Is it true that in these last days we have destroyed the principle of kinship among men and made "democracy safe for the world" and for North Carolina? That all the war laws we now endure will be repealed, and that the people will be free to grow in culture and in wealth and worth? And if so, will the world-old controversies concerning frauds and torts and breaches of contract largely disappear from our dockets? Will not the Government own the public utilities, and all questions of negligence and damages be adjusted by schedules arranged by act of Congress? The titles to all lands will be settled, except the few ever-recurring questions of boundary. But litigation arising out of injuries on highways, in motor vehicles, and in aerial and water navigation will wax more and more in the century before us.

"New occasions teach new duties—
Time makes ancient good uncouth."

Questions concerning wages and price-fixing, hours of labor, child labor, irrigation, water supplies, and those arising out of the dissemination of odors in manufacturing, upper and lower riparian rights, the occupation and conveying of the upper and lower stories of houses, the communication of diseases: these and the like, in a population of ten millions of people, together with race segregation laws that will be sure to arise again and again, will rouse into action the mightiest powers of our mightiest judges.

May some Daniel come to judgment among us in the next century and show this people how two races in the same State, though they may not be agreed, may yet walk together in justice and in peace.

We speak of the supreme powers in a State prescribing the law. We have heard much lately of the cannon, the aeroplane, the submarine, the food supply and man-power as "the last arguments to which kings resort." (Alas for our maxims since there are to be no more kings!) Those are words and phrases of and for the people. Lawyers know that the minds of the Supreme Court judges are the supreme power. Long may this be so in our good land, where "reason is the life of the law."

The Colonial Assembly, followed by the State Legislature (Revisal, 932), vested in the Supreme Court by indirection, the right to determine what was or is the common law, and what parts of it not repealed or enacted by the Legislature were and are good for the people of North Carolina and what parts are not good for us. This has tended to encourage the enactment and repeal from time to time of judge-made law or

judicial legislation. This kind of law will, we think—and the wish may be father to the thought—be less and less in fashion with the Supreme Court until it falls into disuse.

If public schools and the press and, to quote Hamlet, "the occurrents that have more and less solicited" recently shall so elevate our people that lynchings and riots shall cease, that conservatism and property shall be in no danger from hasty and ill-considered legislation, we may cease to need a written constitution. That will be true when democracy becomes absolutely safe for our State. Then the oath to support the Constitution will no longer be required, and the judges will cease to exercise the high prerogative heretofore exercised of declaring acts of Legislature unconstitutional. I have no assurance that we will adopt this course in the next century of this Court's life.

The growth of our population and increase of judicial work will in the next century increase our Supreme Court judges to nine, two or three of whom will no doubt be women, whose presence will continually suggest the transformation since 1915, when it was held in this very tribunal that our laws were so written that females were disqualified to be even notaries public!

In the century just passed many eminent minds adorned this judgment seat. None greater perhaps than those who now serve here. For have these not, in addition to the results of their own labors and research, those of all their predecessors canned and preserved for instant use? Are not our judges and lawyers in a peculiar sense "the heirs of all the ages in the foremost files of time?" And so will our successors be.

The last semi-centennial of this Court was marked and honored by the abolition in this State of the death penalty in more than forty cases, and more than forty kinds of civil actions, as well as all distinctions between actions at law and suits in equity and the forms thereof. The principles upon which all actions are determined abide.

An old common-law lawyer said of equity, "It is a roguish thing. For law we have a measure. Equity is according to the conscience of him who is chancellor, and as that is longer or narrower, so is equity. It is all one as if they should make the standard for the measure we call a foot, a chancellor's foot. What an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing in the chancellor's conscience."

An equity lawyer spoke of the judicial discretion of the judges of the law courts: "The discretion of a judge is the law of tyrants: it is always unknown: it is different in different men. It is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable."

No doubt many lawyers in the past—and litigants, too—(I am not speaking of the present) have felt the force of those observations, and have appreciated the feelings of Cardinal Wolsey when Judge Shelley delivered to him the mandate of that model of virtue, mirror of wisdom, and fountain of justice, King Henry VIII., in regard to surrendering his estates: "Master Shelley, you shall report to the king's highness that I am his obedient subject and faithful chaplain and bondsman, whose royal commandment and behest I will in no wise disobey, but most gladly fulfill and accomplish his princely will and pleasure in all things and in especial in this matter, inasmuch as ye, the fathers of the laws, say that I must lawfully do it. Therefore I charge your conscience and discharge mine. Howbeit, I pray you show his majesty from me that I most humbly desire his highness to call to his most gracious remembrance that there is both a heaven and a hell."

Lawyers and litigants of the future in North Carolina will not, if they ever did, entertain any such thoughts as I have quoted of and concerning the judges. The Witen-a-gamote—the council of wise men and women, who will compose this great tribunal after democracy shall be made safe for the world—will approach every subject presented with absolute knowledge of the law without any latitude or range for judicial discretion or the longitudinal conscience of the chancellor, and a true and scientific conclusion reach in accordance with this then exact science.

And the people will regard the judiciary as Sir Thomas More, author of Utopia, regarded and said of himself when he was Lord Chancellor of England: "But this one thing I assure thee, on my faith, but if the parties will at my hands call for justice and equity, then, although it were my father, whom I reverence dearly, that stood on the one side and the devil, whom I hate extremely, were on the other side, his cause being just, the devil, of me, should have his right." So will it be said of our judiciary, as it was said by another of the judiciary of England: "No British judge can be swerved a hair's breadth from the line of duty by any earthly consideration."

The system of selecting judges having veered from appointment by the sovereign during his will and pleasure, or during good behavior, to nominations by party convention, caucus or primary, and at one time apparently being about to subject the judges to recall by the popular vote for unpopular decisions, has another turn of fortune's or time's wheels before it. No autocrat or party caucus or primary or convention will in the future name the judges. Politics, which in practice has been defined as "a systematic organization of hatreds," will cease to have any part in the selection of judges, but they will be selected by the association of lawyers without regard to party affiliations, or will be members of all political parties.

It has been actually computed by an enterprising law publisher in the last few years that a majority of the cases decided by the appellate courts of America "went off" on questions of practice and procedure. Let us hope that the Supreme Court of the future will, with or without the aid of the lawyers, find a way to make every case turn on its real legal merits; that "harmless error" and long dissenting and concurring opinions, costing so much time and money to write and print and read, will be things of the past; that a clear, short statement of the law in a few sentences and the reason on which it is based in a few others, with brief and lucid headnotes and indexes, will be the rule of the Supreme Court of the future.

There will be no undue veneration for what somebody else has said or thought in a bygone age, nor any reverence for precedents, but a clear compelling knowledge of which is the better reason, and a support of it that will be all-convincing.

Hugo Munstenburg suggested that the psychologists of the future might invent a device by which the truthfulness of the words of a witness may be tested with unerring accuracy. And who knows but that the womb of time shall bear for the use of the servitors in the temples of justice real touchstones and mete-wands that will strike to the heart of the case and bring out truth and justice every time: so clear and shining that the losing party can see it, and not be thereby reminded of his hope that there is a heaven and also a hell.

The world war has just ended. It was fought by the victors, as it was said, to put an end to war for all time to come. We are told that their purpose has been accomplished; that all men will henceforth know how to govern themselves. This nation has had the first opportunity to test the truth of the statement by governing itself while its executive head has gone to assist in arranging for the first "parliament of man and federation of the world." The fangs of hate that caused the world to war have been drawn. Man will no longer be conceived in sin and brought forth in iniquity. Even peace with victory, we are now taught, will not again, when the vanquished have recovered strength, start the black horse and his rider on their march of death.

The world-old maxim "*Inter arma leges silent*" is to drop out of time and be forgotten, for the days to come will furnish no facts to prove its truth. Never again, let us hope and pray, will the laws be silent, but ever speaking and declaring rules for every condition that may arise. Old Jack Cade's prophecy of the good time to be ushered in by killing all the lawyers will never come. The triumph of reason over unreason in courts of justice and in the minds of men will be the supreme perpetual purpose of the race. Thus we seek after God and think His thoughts after Him. So long as there may be two opinions about a

matter and different points of view and angles of interest, so long will students of law investigate and contend concerning its meaning, and great judges will declare which is the better reason. The progress and development of the human intellect is unlimited. The law will be found, as the rule of right, for every new condition that may arise.

So we see the State in the century beginning today making great progress in wealth, in population, in intellect, in education, and in character. And the larger minds that will be needed for action on this larger stage, before this larger audience, will come forth out of our midst and fill the measure of the new time's demand.

Great men are the greatest and best gifts of God to His earth. Let us hope that in the cycle beginning today the God and father of us all will bring forth on this planet, in our beloved niche of it, even in North Carolina, one great man to lead His people; and whether prophet, priest, or king, or judge, or by whatever name he may be known, may they follow him to higher and higher levels.

THE OFFICERS OF THE COURT, 1819–1919.

By Marshall DeLancey Haywood,
Marshal and Librarian.

Gentlemen of the Bench and Bar, Ladies and Gentlemen:

Honored by an invitation from the North Carolina Bar Association to appear before this assemblage today and speak of the "Officers of the Court"—Clerks and Marshals—who have served in bygone years, I am here to perform, as best I can, the duty thus assigned me.

Seven Clerks and four Marshals make up the list. The Clerks have been William Robards, John L. Henderson, Edmund B. Freeman, Charles B. Root, William H. Bagley, and Thomas S. Kenan; also James R. Dodge, Clerk of the Summer sessions formerly held at Morganton. The Marshals have been Colonel John T. C. Wiatt, James Litchford, David A. Wicker, and Robert H. Bradley.

CLERKS.

WILLIAM ROBARDS,
Clerk.

On January 4, 1819, at the first sitting of the Supreme Court, it elected William Robards, of the old town of Williamsborough, in Granville County, to the office of Clerk of the Court. Mr. Robards was a native of Goochland County, Virginia, born November 20, 1779, and was brought by his father (James Robards) to North Carolina when quite young. Before he became an officer of the Supreme Court he had already seen something of public life, having sat in the North Carolina House of Commons as a representative of Granville County at the sessions of 1806 and 1808. He was deeply interested in the cause of general education, and was associated with Chief Justice Henderson in conducting a law school at Williamsborough. He was also a trustee of various educational institutions—of the Williamsborough Academy, of the Oxford Academy, and of the University of North Carolina, his term in the last mentioned capacity extending from 1827 until his death.

Though the objects for which it labored did not take form in the shape of a public institution until a score of years later, a Society for Establishing an Institution for the Deaf and Dumb was organized in North Carolina as early as 1827, and was incorporated by chapter 64 of the Laws of 1827-28. Mr. Robards was a member of this society, and also served on its Board of Directors.

After his election as Clerk of the Supreme Court in 1819, Mr. Robards

occupied that position until he was elected State Treasurer, or "Public Treasurer," as it was then called, by a joint ballot of the General Assembly on December 14, 1827. Immediately after this, he resigned his office with the Supreme Court, and entered upon his new duties. He filled the office of Public Treasurer with marked ability for several years until the end of 1830, his successor being elected on the 4th of December in that year. He thereupon returned to his old home in Granville County, and there spent the remainder of his life.

The wife of Mr. Robards was Ann (or "Nancy") Keeling Satterwhite, daughter of Thomas Satterwhite, and a lady of wide connections in Granville County among such well-known families as those of Williams, Bullock, Henderson, Burton, Ridley, etc. Mr. Robards left a numerous posterity, whose members have well measured up to the good name which he bequeathed to them. These, for the most part, still live in Granville and Vance counties (Vance being a part of old Granville), and some have removed to Tennessee, the Gulf States, and other localities throughout the Union.

In his religious affiliations Mr. Robards was an Episcopalian, and was a vestryman of the historic St. John's Church at Williamsborough. He died on the 17th of June, 1842. I cannot better conclude this sketch of his life than by quoting a tribute to his memory, which appeared in the *Raleigh Register* of June 24th, a few days after his death. In part, that paper said: "He suffered much from a long and severe illness, which he bore with a degree of fortitude never surpassed. Of the character of the deceased it would be useless to speak to those who knew him well. All will bear testimony to the magnanimity, the noble disinterestedness, and unceasing patriotism which characterized his whole life. As a neighbor, he was obliging and hospitable; as a friend, ardent and constant; as a citizen, just and ready in the performance of every duty. No one in distress ever appealed to him in vain when, by any exertion or sacrifice of his own, that distress could be alleviated or removed. He filled many high public offices during life, the duties of which he performed with a fidelity seldom equaled, and for which he received the highest commendations of his fellow-citizens. By the State generally, and particularly by his neighborhood, will his death be felt as a heavy loss. Nor were the incidents of his death less gratifying than his life was useful and upright. He professed confidence in the truth and a firm reliance on the faith of the Christian religion."

JOHN LAWSON HENDERSON,
Clerk.

JOHN LAWSON HENDERSON was the second Clerk of the Supreme Court, elected in January, 1828, to supply vacancy caused by the resig-

nation of William Robards. Mr. Henderson was a younger brother of Chief Justice Leonard Henderson, and a son of Judge Richard Henderson, who figured prominently in public life prior to the Revolution and during that war.

John L. Henderson was born in Granville County in the year 1778, and graduated from the University of North Carolina in the Class of 1800. He entered the legal profession, but never attained a degree of success therein in any way equal to his two distinguished brothers, Leonard and Archibald. He made his home in Salisbury, and was borough representative from that town in the North Carolina House of Commons at the sessions of 1815, 1816, 1823, and 1824. In 1827 he was appointed Comptroller of State, an office (later abolished) similar to the present post of State Auditor, being chosen to fill an unexpired term. He was a candidate before the next General Assembly for re-election, but was defeated by James Grant, of Halifax. About this time (January, 1828) he was elected Clerk of the Supreme Court to fill vacancy caused by the resignation of Mr. Robards, and retained that office throughout the remainder of his life.

Mr. Henderson never married. In the *Papers of Archibald D. Murphey*, published by the North Carolina Historical Commission, is an amusing letter from Judge Murphey, dated December 15, 1809, wherein the writer tried to work a reformation in his friend, in part, saying: "I rejoice to see my friends get married. I always regard the stock of human happiness as thereby increased. Whilst so many young men of your acquaintance are thus adding to their happiness, feel you no wish to add to yours? In the circle in which you move, can no one be found whom you love, and whose hand and heart you can consider as the richest treasure of this life? I hope there is. Get married, dear friend, and get a wife of good sense." Henderson, alas! never got a wife, either with or without "good sense."

Mr. Henderson died in office on the 11th day of July, 1843. The *Raleigh Register*, of July 14th, contained an obituary of the characteristic brevity of that day, which said:

"DIED.—In this city, of congestive disease, on Tuesday last, in the 66th year of his age, John L. Henderson, Esq., Clerk of the Supreme Court of North Carolina. Mr. H. resided in Salisbury, but was here in attendance on the Court now in session. He was buried with Masonic honors."

The funeral of Mr. Henderson was conducted from Christ Church, in Raleigh, on the day following his death, by the Rev. Richard S. Mason, D.D., Rector of the parish.

EDMUND B. FREEMAN,
Clerk.

On July 13, 1843, EDMUND B. FREEMAN was elected Clerk of the Supreme Court, *vice* John Lawson Henderson, who had died two days earlier. Before becoming Clerk, Mr. Freeman had served as Deputy Clerk under Mr. Henderson, and hence was in the service of the Court for a longer period than the twenty-five years in which he held the higher position.

Mr. Freeman was born in Falmouth, Massachusetts, on the 8th day of September, 1795. He was a son of the Rev. Jonathan Otis Freeman, D.D., a distinguished Presbyterian clergyman, who did much educational work in North Carolina, teaching at various points throughout the State. This clergyman was a brother of the Right Rev. George Washington Freeman, D.D., for some years rector of Christ Church, Raleigh, and later Missionary Bishop of Arkansas and the Southwest. Brigadier-General Nathaniel Freeman, of the Massachusetts militia in the War of the Revolution, was the father of the Rev. Dr. Freeman and of Bishop Freeman, and hence was the grandfather of Edmund B. Freeman.

When he was a ten-year-old child, Edmund B. Freeman was brought to North Carolina by his father. After completing his general education, he studied law and was duly licensed, but the probability is that he never engaged in active practice. For a while, in early life, he edited the *Compiler,* a newspaper published at the town of Halifax. For one or more terms of the Legislature he was Reading Clerk of the House of Commons, and was Principal Clerk of the State Constitutional Convention of 1835. From his election as Clerk of the Supreme Court in 1843 until his death, he was one of the most conscientious and capable officials who ever served any court in North Carolina. His heart, as well as his brain, was put into his work; and there were countless gentlemen of both the Bench and Bar who profited by his knowledge and experience. Alluding to Chief Justice Ruffin, in an oration on that great jurist, the late Governor Graham said: "The precision and propriety of entries, in every species of procedure, were brought to a high state of perfection mainly by his investigations and labors, in conjunction with those of that most worthy gentleman, and modest but able lawyer, Edmund B. Freeman, Esq., late Clerk of the Supreme Court."

Mr. Freeman served in his office as Clerk of the Supreme Court until he passed from his earthly labors. The 30th of June, 1868, was the day set for the Court, under its old form, to pass out of existence, and for the Court under the new State Constitution to take over its duties; and on that very day the old Clerk died, thus ending his labors

with the final adjournment of the old Court whose history had been so closely entwined with his own life. An entry on the Minute Docket, under date of June 30th, says: "At the hour of 2 o'clock, p. m., on this day, Edmund B. Freeman, the ancient Clerk of this our Supreme Court, expired." On the next day (July 1st) Attorney-General Sion H. Rogers announced Mr. Freeman's death in Court (convened for memorial services), and offered a set of resolutions on behalf of the gentlemen of the Bar, expressive of the esteem in which they held the late Clerk, both personally and officially. Replying, Chief Justice Pearson said:

"*Gentlemen of the Bar:* The Judges of the Supreme Court fully concur in your resolutions. We have known Edmund B. Freeman long and intimately. In his private associations, he was kind and agreeable, and in the duties of his office 'no one could him excel.' He was trained to be a clerk from infancy, and was fond of the vocation. He displayed great ability, not only in accuracy of detail, but also in grasping the scope of complicated cases whilst stating accounts. His integrity and entire fairness in discharging his duties no one ever called in question, and he earned and is entitled to the distinction of having been a 'model clerk.' His attachment to the *Old Court* was so strong that on several occasions he said to the Judges: 'I cannot outlive the Court, or work in any other traces!' That the Court should have *died* on the same day with its Clerk is a coincidence that is remarkable, and to theorists may form a topic of discussion. The Court orders that the resolutions be entered upon the records, and that a copy thereof be transmitted to Mr. Freeman's family."

On this same old Minute Docket is given a poem written in memory of Mr. Freeman by Mrs. Mary Bayard Clarke. Part of this was quoted by Dr. Battle in his History of the Supreme Court printed in the 103d North Carolina Reports. The entire poem is as follows:

The old Clerk sits in his office chair—
His head is white as snow,
His sight is dim, and his hearing dull,
And his step is weak and slow;
But his heart is stout, and his mind is clear,
As he copies each decree,
And he smiles and says, as the Judges pass,
"'Tis the last Court I shall see."

But he lingers on, till his work is done,
To pass with the old *régime*,
When he lays his pen with a smile aside
To stand at the Bar Supreme;
For the old Clerk died with the Court he served
For forty years, save three,

And breathes his last as the Judges meet
To sign their last decree.

The Pointed Sword at his Naked Heart*
With a child-like smile he views,
For his spirit glows with the fervid heat
Good deeds alone diffuse,
For like his Lamb-skin Apron white*
Is the life that he had led,
And Sinai brings before the Court
No charge against the dead,
While Calvary unbars the gates
Of Heaven, and entrance gives
Unto his soul, which meekly saith,
"I know my Redeemer lives."

Mr. Freeman was twice married. His first wife's maiden name was Mary McKinney Stith. She died January 25, 1835. By her he had an only daughter, Emily, who became the wife of the late Hampden S. Smith, and left several children, one of these being Hampden Freeman Smith, former City Clerk and a bank officer in Raleigh, but now residing in New York City. The second wife of Mr. Freeman was Mrs. Elizabeth Ellis Foreman, *née* Williams, widow of William Foreman, of Pitt County. He left no children by that wife, who died November 11, 1848.

Mr. Freeman was a deeply religious man and an Episcopalian in his religious affiliations, holding his membership in Christ Church, Raleigh, of which his uncle was rector for so many years. He was also a Mason, and served as Junior Grand Warden of the Grand Lodge of North Carolina from December 11, 1833, to December 5, 1834, and from December 7, 1835, to December 14, 1836.

CHARLES BOUDINOT ROOT,
Clerk.

The immediate successor of Mr. Freeman, as Clerk of the Supreme Court, was CHARLES B. ROOT, of Raleigh. Mr. Root was elected Clerk *ad interim* for a term of six months, beginning July 1, 1868, and ending January 4, 1869. He and Mr. Freeman were close friends, and they married cousins. It was largely for the purpose of winding up the office accounts of the deceased Clerk (at the request of his daughter) that Mr. Root accepted the temporary appointment tendered him by the Court. The Deputy Clerk *ad interim* was Johnston Jones, later Adjutant General and now a resident of California.

Like his predecessor in office, Mr. Root was a New Englander by birth, but spent sixty-six of his eighty-four years in Raleigh. He was

*Masonic symbols.

born in the town of Montague, Massachusetts, on the 31st day of October, 1818. His paternal descent ran through many generations of sturdy and prosperous New England ancestors back to Thomas Root, who came to America in 1637.

Along with the other children of Elihu Root, of Montague, Charles B. Root received good educational training, and was a student at the academy in Greenfield, Massachusetts. Leaving that institution, he went to New York City, but did not remain long, and removed to Raleigh in 1837. Before leaving New York he had been promised employment by a Raleigh jeweler, Bernard Dupuy, with whom he served some time, and whose business he later bought. In 1860, Mr. Root sold his jewelry establishment, and never thereafter engaged in mercantile pursuits. In the early part of the War between the States he was Mayor of Raleigh (serving without compensation), and for eighteen years following the war was president of the Raleigh Gas Company. In the course of his life he was a member of the Board of Aldermen of the city of Raleigh and a member of the Board of Commissioners of Wake County, being chairman of the latter body for some time. From 1884 up to the time of his voluntary retirement, not long before his death, he was Tax Collector of the city of Raleigh. For a long time he held a commission as magistrate in Wake County, this giving him the appellation of "Squire" Root, by which he was known to the citizens of his community. Close attention to the duties of his various stations, and unquestioned integrity in public and private transactions marked his course through life.

In 1848, Mr. Root married Anna Freeman Gales, daughter of Weston R. Gales, of Raleigh. Mr. Gales was a gifted journalist, who succeeded his father, Joseph Gales, as editor of the *Raleigh Register,* and was a brother of Joseph Gales, Jr., who wielded a potent influence in the politics of the nation as editor of the *National Intelligencer,* in Washington City. By this marriage, Mr. Root left a son, Charles Root, now cashier of the Raleigh Savings Bank, and a daughter who married the late Dr. Vines E. Turner, of Raleigh.

"Old Squire Root," as he is still affectionately remembered by the people of Raleigh, was gentle, tender-hearted, and courteous, charitable to the poor, and considerate of the feelings of every one. He passed away in the eighty-fifth year of his age, on the 7th day of May, 1903. His funeral was conducted from Christ Church, of which he was a zealous member and consistent communicant.

WILLIAM HENRY BAGLEY,
Clerk.

As already stated, the commission of Mr. Root as Clerk *ad interim* expired on the 4th day of January, 1869. Two weeks later, on January

18th, Major WILLIAM H. BAGLEY, of Raleigh, was elected Clerk of the Supreme Court for a term of eight years; and by subsequent reëlections, held that position until his death, a little more than seventeen years thereafter.

Major Bagley was born in Perquimans County, North Carolina, on the 5th day of July, 1833, and was a son of Colonel Willis Bagley, a well-known citizen of that section of the State.

In 1852, before he became of age, William H. Bagley was elected Register of Deeds of his native County, and held that position for several years. In 1855, he removed to Elizabeth City, in the adjacent county of Pasquotank, and there engaged in journalistic work as editor of the *Sentinel*. He also studied law, and was licensed to practice in 1859. In 1860, he was associated in the editorial management of another paper, the *State*, with James W. Hinton.

Upon the outbreak of the War between the States, Mr. Bagley entered the Confederate service, and was commissioned First Lieutenant of Company A, Eighth North Carolina Regiment, on May 16, 1861. This regiment being sent to join the forces engaged in the defenses around Albemarle and Pamlico Sounds, Lieutenant Bagley was engaged in numerous actions in that vicinity until February 8, 1862, when he was captured by Burnside's expedition against Roanoke Island, where he was stationed. In recounting this event, the historian who prepared the sketch of the Eighth Regiment for Chief Justice Clark's great compilation entitled *North Carolina Regiments, 1861-65*, says:

"After the surrender of the island on the 8th of February, we were held in camp as prisoners of war about two weeks, when we were conveyed by steamers to Elizabeth City, paroled, and sent home by way of the Dismal Swamp Canal and Portsmouth. Whilst prisoners in the hands of the enemy, we were well treated. Of course we were closely guarded, but no insults were offered. During the first and second weeks of September, 1862, the men having been exchanged, the regiment reassembled."

Shortly after the Eighth Regiment reassembled, as just mentioned, Lieutenant Bagley was promoted to the rank of Captain, October 25, 1862, and assigned to his former company. He probably did not rejoin his company immediately, as about this time he had been elected State Senator from the First Senatorial District, composed of the counties of Pasquotank and Perquimans.

On April 15, 1864, Captain Bagley was commissioned Major of the Sixty-eighth Regiment. He did not remain with this regiment long, however, but resigned on June 11th in the same year. He again became a member of the State Senate in 1864.

In July, 1865, President Johnson appointed Major Bagley to the post of Superintendent of the United States Mint at Charlotte, but the recipi-

ent of this appointment could not qualify as he was unable to take the "iron-clad oath" alleging that he had borne no part in what was then officially designated "the late Rebellion."

On December 15, 1865, Jonathan Worth became Governor of North Carolina, and remained in office until turned out several years later to make room for a "Provisional Governor" appointed by the President. Major Bagley was appointed Private Secretary by Governor Worth, and served in that capacity for some time. In 1866, he married the Governor's daughter, Miss Adelaide Worth. This venerable lady survives her husband, and now resides with her two unmarried daughters in Washington City. One of the children born to this marriage was Ensign Worth Bagley, killed in the War with Spain, and in whose honor a statue now stands in the Capitol Square at Raleigh. William Henry Bagley, second son, is engaged in newspaper work. A third son is Commander David Worth Bagley, of the Navy, who saw active service in the war just closed. One of Major Bagley's daughters is Mrs. Josephus Daniels, herself a patriotic welfare worker in connection with the late war, and wife of the present Secretary of the Navy, whose labors have brought the sea forces of our Government up to a scale of magnitude and efficiency never dreamed of before.

Major Bagley was a man of handsome and distinguished appearance, and enjoyed a good measure of health up to the month of November, 1885, when he suffered an attack of illness from which he never recovered, and which resulted in his death a few months later, despite treatment by the most eminent members of the medical profession of both Raleigh and Baltimore.

No sketch of Major Bagley's life would be complete without reference to his connection with the Independent Order of Odd Fellows, in which fraternity he held the highest honors. He was initiated into this order in 1857 as a member of Achoree Lodge, No. 14, of Elizabeth City. In 1865, he transferred his membership to Seaton Gales Lodge, No. 64, of Raleigh, and became a member of McKee Encampment, No. 15, in the same city. He represented the Grand Lodge of North Carolina in the Grand Lodge of the United States (afterwards known as the Sovereign Grand Lodge) from 1874 until 1886, and was Grand Master of the Grand Lodge of North Carolina from May, 1873, until May, 1874.

The death of Major Bagley occurred at his home in Raleigh on the 21st day of February, 1886, and caused wide regret. The *News and Observer* (then edited by Captain Samuel A. Ashe) said: "Major Bagley was held in very high esteem here, and the grief at his death is deep and sincere." In the Journal of Proceedings of the Grand Lodge of Odd Fellows, a memorial of him declared: "Outspoken at all times, always having the courage of his convictions, steady in friendship, firm in his ideas of right, yet at all times courteous, considerate, and amiable,

he acquired and held unto the end the warm and affectionate regard of his brethren."

The funeral services of Major Bagley were held on February 23d from the First Presbyterian Church in Raleigh, being conducted by the Rev. John S. Watkins, D.D., assisted by the Rev. William C. Norman, pastor of the Edenton Street Methodist Church. In attendance were the officers of the State Departments, the Justices and officers of the Supreme Court, the Raleigh Bar in a body, a numerous representation of Odd Fellows, and a large concourse of citizens.

THOMAS STEPHEN KENAN,
Clerk.

COLONEL THOMAS S. KENAN, whom we all remember so well, was elected Clerk of the Supreme Court on the 1st day of March, 1886, to fill vacancy caused by the death of Major Bagley, and qualified two days later.

Before his election as Clerk, Colonel Kenan had won high reputation both as a soldier and lawyer. He was born on the 12th day of February, 1838, at the county-seat of Duplin, Kenansville, a town named in honor of his family. He was the eldest son of a prominent citizen of that section, Owen R. Kenan, member of the Confederate Congress. Owen Kenan's father, Thomas Kenan, member of the United States Congress, from 1805 to 1807, was the son of Colonel James Kenan, an active and courageous officer of the Revolution.

After a preparatory education at Old Grove Academy, in Kenansville, and at the Central Military Institute, at Selma, Alabama, Thomas S. Kenan entered Wake Forest College and completed his freshman year there. He left in 1854 to enter the University of North Carolina. He graduated with the degree of A.B. from the University in 1857, later being given the degree of A.M. He studied law at Richmond Hill under Chief Justice Pearson, and located for the practice of his profession at Kenansville in 1860. Closely following this came the outbreak of the War between the States. Mr. Kenan promptly volunteered his services to the Confederate Government, and was chiefly instrumental in raising the Duplin Rifles, of which he was elected captain. This company was later made a part of the First or "Bethel" Regiment, then assigned to the Second Regiment, and eventually it became a part of the Forty-third Regiment. Colonel Kenan bore an honorable part in many hard campaigns and bloody battles until he was badly wounded while leading a charge at Gettysburg. On the next day he fell into the hands of the enemy, while being carried to the rear in an ambulance train, and was sent to the military prison on Johnson's Island, in Lake Erie. There

he was confined until 1865, when he was released on parole. The war ending about this time, he was never exchanged.

Immediately after the close of the war, Colonel Kenan was elected a member of the State Senate from Duplin County, serving at the sessions of 1865 and 1866. In 1868, the Democrats of his district nominated him for a seat in Congress, but he was defeated.

He removed from Kenansville to Wilson in 1869, and became Mayor of the latter town, serving from 1872 until 1876. In 1876, when the Democratic party was searching out strong men to make up the ticket for that year and carry on the campaign under the leadership of Vance, Colonel Kenan was nominated for Attorney-General, was duly elected, and held that position eight years, during the administration of Governors Vance and Jarvis, from January 1, 1877, until January 21, 1885. About a year after the expiration of his term, he was elected Clerk of the Supreme Court, as already mentioned, and he retained that office up to the time of his death, a little more than twenty-five years thereafter, on the 21st of December, 1911.

On May 20, 1868, Colonel Kenan married Miss Sallie Dortch, daughter of Dr. Lewis Dortch, a native North Carolinian residing in Mississippi. No children were born to this union.

In personal appearance, Colonel Kenan was one of the most strikingly handsome men of the generation in which he lived. An oil portrait in the Clerk's office, preserving his likeness in a realistic manner, has been presented by his family, an example which it is hoped that the descendants of his predecessors will follow by placing there portraits of Robards, Henderson, Freeman, Dodge, Root, and Bagley.

Colonel Kenan's interest in the University was deep and lifelong. He was a trustee for many years, and there was seldom a commencement that he did not attend. He lived to celebrate with the survivors of his class the fiftieth anniversary of graduation. He was an Episcopalian in religion, and a member of Christ Church, at Raleigh, for many years prior to his death. In the western gallery of this church is a handsome set of memorial windows erected in his honor. He was a member of the Masonic fraternity, and held the post of Deputy Grand Master of the Grand Lodge in the years 1877-78. He was one of the charter members of the North Carolina Society of the Sons of the Revolution, being president of that organization at the time of his death, and for some years prior thereto. He was a member of the United Confederate Veterans, and member of the advisory committee of the Ladies Memorial Association, of Raleigh. He contributed a valuable sketch of the Forty-third Regiment to Chief Justice Clark's compilation entitled *North Carolina Regiments, 1861-65*. His own purse was ever open to aid a Confederate veteran who had failed of fortune in the contest of life, and

he took a deep interest in the pension legislation of the State, as well as in the Soldiers' Home at Raleigh. Yet with all of his interest in Confederate matters, there never lived a man more free from sectional bitterness, or one who had less patience with any one who strove to rekindle sectional animosity. While the war lasted he was a loyal Confederate, never flinching from the ordeals of camp, field, or prison; but after the return of peace, though disappointed of his hopes for Southern independence, he spent no time in railing at his former adversaries, but became a friend and brother of all good Americans.

The foregoing sketch of Colonel Kenan concludes what I have to say of the Clerks who have served in the State Supreme Court at Raleigh. It is not my purpose to speak of the present incumbent, Joseph L. Seawell, who began his connection with the Court when less than fifteen years of age, as an office clerk under Major Bagley, and who well measures up to the best of his predecessors in point of efficiency. Before taking leave of the Clerks who have labored in Raleigh, however, I must say a few words of the excellent gentleman who served in the same line of work many years ago, during the time (1847-61) when the Court held a Summer session each year in the mountain town of Morganton.

JAMES RICHARD DODGE,
Clerk (Morganton Division).

It is a fact now almost forgotten that the Supreme Court of North Carolina held a Summer term each year at the town of Morganton for nearly fifteen years, beginning in 1847 and ending in 1861. It was by chapter 28 of the Laws of 1846-47 that this Summer term was established, the action being taken for the convenience of the lawyers of western North Carolina, Raleigh then being almost inaccessible to those residing in that section, owing to the lack of railroads and the bad condition of the stage roads. The Court at Morganton maintained an existence until the opening of the War between the States, when it was abolished by chapter 4 (ratified September 11, 1861) of a volume of statutes entitled "Public Laws of the State of North Carolina, passed at the General Assembly at the Sessions of 1861-62-63-64 and one in 1859."

JAMES R. DODGE was the Clerk of the Supreme Court for the Morganton Division during the whole period of its existence. He was elected on the 20th of February, 1847, and qualified in open court on the first day of its session, August 2, 1847. The Sheriff of Burke County acted as Marshal.

Mr. Dodge was born at Johnstown, in the State of New York, on the 27th day of October, 1795, and belonged to a family which had been

settled in America since 1629. His father, Richard Dodge, had run away from home at the age of fifteen to join Washington's army in 1778, served as a fifer until 1782, and became a Brigadier-General in the War of 1812-15. In the latter war, James R. Dodge, the subject of this sketch, acted for a while as his aide-de-camp, also serving in a company called the Albany Independent Volunteers. The wife of General Dodge, and mother of James R. Dodge, was Ann Sarah Irving, a sister of the celebrated American author, Washington Irving. At the home of his father, who was much given to hospitality, young James Dodge became well acquainted with many of the most noted military and naval leaders of that day.

Being resolved to seek his fortune in the South, James R. Dodge, when twenty-two years old, embarked for Charleston, South Carolina, but was destined never to reach that port. A storm so damaged his ship that she put into the port of Norfolk, Virginia, and could never be made sea-worthy again. This changed Mr. Dodge's plans. He removed to Petersburg, and spent two or three years in that city. While there, he studied law, and procured a license to practice in the State of Virginia. He came to Raleigh in 1820, and soon won the friendship and confidence of such well-known members of the legal profession as Judges Taylor, Henderson, and Hall of the Supreme Court; Ruffin, later to become the greatest of Chief Justices; Badger, Gaston, Archibald Henderson, and many others.

Legal business carrying Mr. Dodge to Stokes County, he decided to settle at Germantown, the county-seat. About the year 1823 he seems to have been a resident of Lexington, as he represented St. Peter's Church, in that town, in the Diocesan Convention of 1823 which elected John Stark Ravenscroft to the Bishopric. He removed to Wilkesboro in 1826 and remained until 1834. From that year until 1838, he resided in Lincolnton, being Solicitor of the Judicial District in which that town was located. In a brief autobiography prepared not many months before his death, Mr. Dodge (referring to his removal from Lincolnton) says: "Upon consultation with my sympathizing and truly pious wife, we retired to the banks of the Yadkin, our cottage and farm. She managed at home, and I labored night and day at Court, at Raleigh and at Morganton. At home we were always happy; care or trouble never entered our door, and these years were the happiest of my life."

The wife of Mr. Dodge, to whom he was married on the 24th of May, 1826, was Susan Williams, daughter of Joseph Williams, and granddaughter of Colonel Joseph Williams, a noted Revolutionary patriot of Surry County. The home of Mr. Dodge, "on the banks of the Yadkin," was originally in Surry County, but later became a part of Yadkin County when the latter was created out of a part of Surry in 1850. One

of Mr. Dodge's children was the late Colonel Richard Irving Dodge, of the United States Army. Another, Miss Annie Dodge, became the wife of Captain Chalmers Glenn, of the Confederate Army, who was killed at the Battle of South Mountain, leaving several children, one of whom is ex-Governor Robert B. Glenn, now of Winston-Salem. Another son was the late Adjutant-General James D. Glenn.

Mr. Dodge possessed a keen sense of humor. His famous epitaph on Hillman, Swain, and Dewes is too well known to need repetition.* He lived to a good old age, honored and respected by all who knew him. His death occurred at the home of his daughter, Mrs. Chalmers Glenn, in Rockingham County, on the 24th day of February, 1880.

MARSHALS.

Having given brief sketches of those who served the Court in the office of Clerk, I now turn to the Marshals. When the Court was first organized, the Sheriff of Wake County acted in that capacity. Chapter 136 of the Laws of 1819 compensated the sheriff for these services. The separate office of Marshal was created by chapter 15 of the Laws of 1840-41, ratified on the 11th day of January, 1841, and I shall now have something to say of the four gentlemen who formerly held this office.

JOHN TODD COCKE WIATT,
Marshal.

The first Marshal of the Supreme Court was COLONEL JOHN T. C. WIATT, a native of Virginia, who had been a resident of Raleigh for many years. He had figured as an officer in the War of 1812-15, and later was a well-known citizen of Wake County.

He evinced a strong interest in military matters throughout his entire life. He was captain of a company of infantry in Raleigh prior to the outbreak of the War of 1812-15. His command was mustered into the service of the United States in that war as the "Seventh Company, detached from the Wake Regiment." This company (numbering 70 men) formed a part of the Fourth North Carolina Regiment of which Richard Atkinson was Colonel, or "Lieutenant-Colonel Commandant"; Simpson Shaw, First Major; and Benjamin Elliott, Second Major. The regiment was made up in 1812, at the beginning of the war. In his 1892 Centennial Address on the City of Raleigh, the Hon. Kemp P. Battle, LL.D., refers to Captain Wiatt's war record and subsequent career in these words: "The leader of the Raleigh Volunteers, Captain J. T. C.

*See Wheeler's *History of North Carolina*, Part I, p. 108.

Wiatt, afterwards Colonel Wiatt, was a remarkable man; and if he had had an opportunity would have become eminent as a partisan officer. He had nerves of steel. When Sheriff of Wake,* his name became famous throughout the State because of his killing a prisoner named Wolfe. Wolfe was a man of great physical strength. He came to Raleigh as a recruiting officer, married, and settled here. He adopted gambling as a business, was arrested under the vagrant act, and committed to Wiatt's custody. Wiatt ordered the jailer, Miller, to change his quarters to the dungeon, as he was fearful of an escape. Wolfe knocked Miller down and was rushing for the door, when Wiatt shot and killed him. His action was decided to be justifiable. In 1841 the Supreme Court of the State made him its Marshal, in which capacity he acted until his death."

By a reorganization of the North Carolina Militia, which took place during the War of 1812-15, the troops of Wake County were divided into the First Regiment (containing 756 officers and men) and the Second Regiment (containing 732 officers and men). Of the former regiment, Captain Wiatt became First Major; and the command of it devolved upon him, as senior officer, when Colonel Rogers resigned early in 1815. In the same year, Major Wiatt was promoted to the rank of Colonel, and retained command of the First Wake Regiment for some time.

After the war, Colonel Wiatt set up an establishment for the manufacture of coaches and other vehicles, on his lot west of the courthouse. Under date of November 29, 1815, he makes announcement of this business through the Raleigh papers. In the same card he thanks the public for past favors, so he may have been engaged in a similar line of work before. Several years thereafter (March 15, 1818) an advertisement of like nature was made by him and his brother under the firm name of Haute C. Wiatt & Company. At a somewhat later date, he gave up this business and became a planter.

Colonel Wiatt belonged to the Masonic fraternity, and was a member of Hiram Lodge, No. 40, in the city of Raleigh. After filling several lesser stations in his lodge he became Worshipful Master in 1815, holding that post for five terms, his service ending in 1819. He was also, at a little later time, one of the Grand Stewards of the Grand Lodge; and he became Grand Tiler about the year 1824, holding the two offices jointly until December 26, 1827. On the date last given, Richard W. Ashton became Grand Tiler, and Wiatt was continued in the office of Grand Steward until 1837. He retained his membership in Hiram Lodge up to the time of his death.

*Colonel Wiatt was Deputy Sheriff for a while. I can find no record of his having been Sheriff. — M. DeL. H.

Notwithstanding his high rank in Masonry, it must be confessed that Colonel Wiatt profited little by the ancient precept of the Order, with respect to profanity, which the Fraternity so constantly endeavors to inculcate into the hearts of all members, for he was indeed "full of strange oaths," and bore too close a resemblance to soldiers of old, in the army which "swore terribly in Flanders." Yet withal, he was of a generous and obliging disposition, who took pleasure in contributing to the welfare and comfort of those in need of assistance, especially persons passing on the much traveled highway which led by his country home. Long before the poet voiced the sentiment in words, it was his delight to

"Live in a house by the side of the road
And be a friend to man."

By the fence dividing his front yard from the public highway, he had a well dug, and equipped it with a rope, on each end of which was a bucket, one swinging inward for his family's use, and one swinging outward for the use of any thirsty wayfarer who might stop to refresh himself or his horse before continuing his journey. In the aforementioned 1892 Centennial Address on the City of Raleigh, Dr. Battle says: "Old-time travelers remember the cool water of his well four miles west of town on the road to Chapel Hill and Hillsboro. The drivers of the public stages always watered their horses at Wiatt's well."

In connection with this well, an amusing tradition survives. On one occasion, several gay young students from the University of North Carolina were traveling the road between Chapel Hill and Raleigh. While stopping for water at this well, one of them occupied his time by teasing a chained bulldog belonging to the colonel. The owner finally became annoyed, and called out: "If you don't let that dog alone, I'll turn him loose on you." To this threat came the defiant reply: "Turn him loose, and I'll fight him fair." The dog was accordingly released, and was met halfway by the student, who vaulted over the fence into the yard, whip in hand, and showered blow after blow upon the fierce animal, the strokes being accompanied by such a torrent of profanity as had never before been heard in North Carolina since the days of George Burrington. Colonel Wiatt watched the combat with amused interest, and finally saw his dog, with tail stuck between his legs, hastily seeking refuge under an outhouse. Thereupon he went forward and warmly congratulated the victor, remarking: "You have done two things that nobody else ever did—you have made my bulldog run from you; and you have shown me that there is one man in North Carolina who can swear louder and longer than I can. The world is likely to hear from you before it gets much older." After a lapse of some years, Colonel Wiatt happened to be in Raleigh one day, when a friend, accompanied

by another gentleman, called to him and said he wished to introduce his companion, a clergyman of North Carolina birth, who had been absent from the State for some years, and had stopped in Raleigh to renew an acquaintance with some of his old friends. Upon recognizing the minister as the hero of the bulldog encounter in former years, and as the one whose proficiency in profanity had excited his wonderment (if not envy), Colonel Wiatt remarked: "I once had the pleasure of hearing this gentleman talk, but he was not then preaching the Gospel—according to my recollection." He then related the incident, much to the amusement of several gentlemen who had joined the group, the minister entering heartily into the laugh which followed. On taking leave, Colonel Wiatt declared that he would avail himself of the first opportunity to listen to a sermon by his young friend, as he was confident that no man with such fluency in expressing himself could fail to be entertaining as a preacher. Not many months later, the clergyman was called to the pastorate of one of the principal churches of Raleigh, and became an honored resident of the city, but Colonel Wiatt died just before his arrival.

Colonel Wiatt married Cecelia Dabney, and has quite a number of descendants residing in Raleigh and Louisburg—members of the Foster and Yarborough families. He died at his home near Raleigh, February 23, 1855, and was buried with Masonic honors.

JAMES LITCHFORD,*
Marshal.

JAMES LITCHFORD, of Raleigh, was the second Marshal of the Supreme Court, succeeding Colonel Wiatt in that office. He was born in or near the old colonial capital of Williamsburg, Virginia, in the year 1795. His father, Arthur Litchford, was a pensioner of the United States Government for services rendered during the War of the Revolution.

When the War of 1812-15 came on, young James Litchford was as ready to fight for American rights as his father had been in the "Days of '76," and he enlisted in the Sixth Regiment of Virginia Infantry. His company commander was Captain Edward Pescud, who has many descendants now living in North Carolina. What were the details of Mr. Litchford's services we are unable to state; but as the militia of Virginia and adjacent States was kept busy defending the seacoast around Norfolk from depredations of the military and naval forces brought over by Admiral Cockburn, we may assume that young Litchford had a full share of active service.

*This article is reproduced from a sketch of Mr. Litchford which I wrote for the *News and Observer*, September 23, 1918, giving an account of his portrait which had been presented to the Supreme Court Library by Henry E. Litchford.—M. DEL. H.

In 1818, Mr. Litchford was united in marriage with Mary Archer Gill, of James City County, Virginia. About the same time he decided to remove to the town of Halifax, North Carolina, but remained there only a short time, and came to Raleigh in 1820. He was a citizen of Raleigh for the remainder of his life, being for many years associated in business with his kinsman, James Selby.

Mr. Litchford was a member of the Masonic fraternity. He took his degrees in Hiram Lodge, No. 40, in 1828, but withdrew shortly thereafter. He resumed his membership later in life, however, and continued a member of Hiram Lodge up to the time of his death.

It was in February, 1855, that Mr. Litchford succeeded Colonel Wiatt as Marshal of the Supreme Court. The Court was then composed of Chief Justice Frederick Nash and Associate Justices Richmond M. Pearson (later Chief Justice), and William H. Battle.

Mr. Litchford held the office of Marshal up to 1869, when the Supreme Court was reorganized under a provision of the new State Constitution, placing the election of Supreme Court Justices in the hands of the people, instead of their being chosen by the Legislature, as was theretofore the usage.

Mr. Litchford died on the 1st day of September, 1870, at the age of seventy-five. In alluding to his death, the *Raleigh Sentinel,* in its issue of September 3d, said, in part:

"Mr. Litchford was a native of James City County, Virginia, removed to Raleigh in 1820, and has been a resident of the city for nearly fifty years. He was a most excellent citizen, quiet yet strongly marked in his principles, and an honest man. As a husband, father, and friend, we have known none better. His death is universally regretted."

The funeral of Mr. Litchford was held from the Baptist Church on the morning of September 3d, and he was buried with Masonic honors by Hiram Lodge, No. 40, a number of members of William G. Hill Lodge, No. 218, being also in attendance.

Mr. Litchford left a number of children, one of his sons being the late James J. Litchford, a well-known and highly esteemed citizen of Raleigh. Among the children of the latter is Henry E. Litchford, formerly cashier of the Citizens National Bank, of Raleigh, and now vice-president and treasurer of the Old Dominion Trust Company, of Richmond, Virginia.

DAVID ALEXANDER WICKER,
Marshal.

DAVID A. WICKER became Marshal of the Supreme Court, as successor to Mr. Litchford, on January 12, 1869. This gentleman was a native

of Moore County, North Carolina, and the date of his birth was February 6, 1824. In early manhood he came to Raleigh, and was employed as salesman in a clothing store. He did not engage in this occupation long, however, but removed to Arkansas, and remained there about five years. In Arkansas he was engaged in mercantile pursuits, and was postmaster of the town where he was located. Returning to North Carolina, he engaged in railroading, and became General Freight Agent of the North Carolina Railroad, now a part of the Southern Railway. He lived in Greensboro during a part of the war, there being an enrolled member of the Home Guard, and returned to Raleigh in 1865, upon being appointed Traffic Manager of the old Raleigh and Gaston Railroad, now a part of the Seaboard Air Line System. The office last mentioned included the superintendence of the southern division of the Old Dominion Steamship Line, plying between Norfolk and New York. On one occasion, while on a tour of inspection over this line, his ship was totally destroyed by fire, and he came near perishing in an open boat which was buffeted by the waves for two days before reaching Norfolk. For a while Mr. Wicker held a responsible position with the Southern Express Company.

As already stated, Mr. Wicker became Marshal of the Supreme Court in January, 1869. He was in the service of the Court for a little over ten years, being succeeded in 1879 by Mr. Bradley.

After his retirement from the post of Marshal, Mr. Wicker exercised the duties of a magistrate for some years. A veteran of the Raleigh Bar recently told me that the lawyers of that day enjoyed practicing before him on account of the intelligence, impartiality, and promptitude with which he transacted business.

In 1845, Mr. Wicker was united in marriage with Miss Emma Jane Williams, a daughter of the late Mark M. Williams, of Raleigh. He was the father of eleven children, all of whom are now dead except Robert D. Wicker and Mrs. John R. Upchurch, of Raleigh, and Claude A. Wicker, of Durham. A grandson, Edgar J. Wicker, of Raleigh, received a license to practice law at the last term of this Court. Nor, while mentioning grandchildren, should we fail to record the name of our diminutive friend, Pearson Upchurch, whose labors in manipulating the elevators in this building have proved a great convenience to the Bench, Bar, and general public.

Mr. Wicker died in Raleigh on the 23d of January, 1890. In recording his death, the *News and Observer* said: "Mr. Wicker had held many prominent places of trust, in all of which he did his duties well. Socially he was jovial and companionable, and had many friends and few enemies wherever he was known."

ROBERT HENRY BRADLEY,
Marshal and Librarian.

The fourth Marshal, and the first person to hold the joint office of Marshal and Librarian, was ROBERT H. BRADLEY, whose long and honorable service to this Court and the legal profession in general was terminated by the hand of death less than a year ago, when the days of his life had far exceeded the measurement of threescore years and ten.

Mr. Bradley was born in the good old county of Edgecombe, on the 23d day of August, 1840. He was reared on his father's plantation, enjoying such educational advantages as the neighborhood afforded and industriously aiding in carrying on the work incident to a life in the country. On the outbreak of the War between the States, he enlisted (April 18, 1861) in Company A, of what was then known as the First North Carolina Regiment, but which was later placed between the Eleventh and Twelfth Regiments and designated the "Bethel Regiment." This regiment was then commanded by Colonel D. H. Hill, later a Lieutenant-General, and the company in which Mr. Bradley served was under the command of Captain John L. Bridgers, of Edgecombe County, later Lieutenant-Colonel. After undergoing a course of military training in Raleigh, Mr. Bradley marched with his command to Virginia and was present at the Battle of Bethel. There he was one of the party which volunteered to burn a house which obstructed the fire of the Confederates. In the execution of this design, Henry Lawson Wyatt was killed, being the first Confederate soldier to lose his life in line of battle. After the expiration of Mr. Bradley's enlistment of six months, he was employed as an express messenger on one of the railroads, and served in that capacity for some time. It was then that he decided to make Raleigh his home. Soon after the war, he was appointed Keeper of the Capitol. Later he engaged in mercantile life, and was in a fair way to succeed well in business, when his entire stock of goods was destroyed by fire in 1879. Soon after this misfortune, and in the same year, he was elected Marshal of the Supreme Court. So acceptable were his services that he was later given additional duties and compensation by authority of chapter 100 of the Public Laws of 1883, being thereafter designated Marshal and Librarian. Then it was that his great life-work as a law librarian began, and it must be said that he had a poor subject to start with, for the collection of books—never large, at best, up to that time—had been mismanaged, plundered, and scattered to such an extent that there was not even a full set of the North Carolina Reports in the whole Library. Beginning in the cramped quarters of the Capitol, where the Court then held its sessions, he gathered and classified the collection. In 1886 the Library had grown to such an extent that it was moved to

larger quarters in a new building, and finally was brought to its present location.

Though I knew Mr. Bradley intimately for many years of his life, I never fully realized until I became his Assistant, seven months before his death, the full measure of fortitude under pain and devotion to duty which characterized his life. Often, in his last days, when I saw him racked by pain and weakness, I urged him to go home and rest for an afternoon, but his invariable reply was that he had worked in the Library for so many years that to be anywhere else during office hours made him feel ill at ease and out of place. He performed his duties to the last, and found peace in death on the 17th of May, 1918.

Mr. Bradley was twice married and left four children. His first wife was Miss Harriet King, of Wake County. After her death, he married her cousin, Miss Cynthia A. King. This lady survives him.

Mr. Bradley was a Baptist, and served as a deacon in the Tabernacle Baptist Church, of Raleigh, for many years before his death. For over fifty years he was an active Mason, and held many honors in the various branches of that Fraternity. I feel safe in saying that he was, without exception, the most widely known member of the Order in North Carolina.

To the members of the Bar here present, it is needless to speak of Mr. Bradley's obliging disposition. He served them long and well, and his memory will abide with them for many years to come.

RESPONSE BY CHIEF JUSTICE WALTER CLARK.

"We take no note of time, but from its loss. To give it then a tongue is wise in man."

The tick of the clock tells us that another moment has joined the past eternity. We see by the hand on the dial-plate that another hour has passed. When the sun in supernal splendor sets along the gorgeous west, we know that another day is done. When "seed-time and harvest and summer and winter" have gone by, we know that another year has fled. But neither sight nor sound nor sensation suggests to us that with stately steppings a century has swept by. We only know it from reading the record. We stand today in the presence of history.

The admirable and instructive address of Judge Winston tells us of the progress made by the Court and the changes in the laws, whether by decision or by statute, in the last hundred years. Mr. Hicks has gracefully foretold, as far as any man can foretell, somewhat of the changes we may expect in the next one hundred years.

Mr. Haywood has given us a very interesting account of the inside history of the Court, as shown in the lives of its clerks and marshals.

The Court held its first session one hundred years ago tomorrow, so today closes its century. In more senses than one, that period has been equally divided. During the first fifty years, from November, 1818, to 1868, the judges were elected by the General Assembly and were chosen for life. During the last fifty years the judges have been chosen at the ballot-box and their tenure has been for a term of years.

During the first fifty years of this Court it lived under the practice and procedure formulated in feudal ages by the judges, who for the most part were not lawyers, but priests of the Catholic Church or laymen. The law and procedure created by them was called the common law, as distinguished from the feudal law administered by the barons in their local courts, who hanged or fined or imprisoned their followers, and decided disputes as to civil matters, according to their good pleasure.

As a consequence, during the first fifty years of this Court the Court administered the law according to the views of a ruder age. During that half a hundred years the greatest and most powerful interest in the State was slavery, and the condition of women was little short of it, for upon marriage their property became that of the husband, and he still retained the right to chastise his wife at will, without power in the court to hinder him, provided he used "a switch no larger than his thumb." Judge Little so instructed the jury as late as *S. v. Rhodes,* 61 N. C., 453, at Fall Term, 1867; and Judge Reade, speaking for a unanimous Court,

said there was no error, and that the courts could not punish the husband even though the whipping had been inflicted without any provocation. If the negro was a slave, the wives of white men had only the legal status of a chattel.

In 1868, at the middle of the Court's century, the negro was admitted to a share in the government because emancipated from the master's lash. But not till 1874 did the Court, in *S. v. Oliver,* 70 N. C., 60, recognize that even the courts must bow to the spirit of the age, and emancipated the wife from the husband's whip.

In 1868 both the Federal and the State Constitution admitted the former slaves to a share in the government. It will be a mystery to coming generations that another half-century has passed and we are now only on the eve of admitting that the mothers, wives, sisters, and daughters of the voters of North Carolina are as competent as our former slaves to share in the government. During this half-century, so far as political recognition is concerned, they have remained disfranchised in the same class with convicts, lunatics, idiots, infants, and illiterates. We cannot say that the admission of the negroes to the ballot-box by the Fifteenth Amendment was entirely forced upon this State, for among the members of the North Carolina Legislature who voted to ratify the amendment conferring suffrage upon our former slaves the record shows the names of Thomas J. Jarvis, James L. Robinson, Edward W. Pou, and other leaders of like character.

In the recent election in England the vote of the women was conservative, and so it will be here, for such is their nature. Their vote will be needed. It will always be cast for the home and its best interests.

Though the Constitution of 1868 did not admit the women of the State to a share in the government which was granted to the former slaves, it did not disqualify them from holding office,* and it did expressly confer upon married women the ownership of their property inherited or in whatever manner acquired, "as fully as if they had remained unmarried," with the single requirement of the written assent of the husband to a conveyance of realty. But such was the force of precedent and preconceived opinions that the judges, who had been educated under the feudal ideas as to the incapacity of women to manage property, blandly continued to hold that wives were not only incapable to contract, but that their husbands could recover their earnings from their personal labors, and for mental and physical anguish sustained by them from personal injuries, and continued to assimilate their condition, as far as possible, to the old feudal conditions until by act of the General Assembly

*It merely provided that "Every voter" (meaning merely to include the newly enfranchised negro) should be eligible to office. Cons., Art. VI, sec. 7.

married women have at last been partly, but not yet entirely, vested with the rights granted them by the Constitution.

The Constitution of 1868 also emancipated the law from those fetters of form which made one of the greatest reproaches of the system we had inherited from the judges who formulated the common-law practice. The Constitution of 1868 absolutely abolished all distinction in the forms of action, and even divorced us from the fetish that there was an inherent and insurmountable distinction between law and equity.

Under the system in force when this Court was formed, a hundred years ago, it was esteemed a crime for a man to become unfortunate financially, and he was accordingly imprisoned if he could not pay his debts. One of the most distinguished judges who ever sat upon this Court, a leader in thought, and one of the originators of our common-school system, and the pioneer of internal improvements, was imprisoned for months in Guilford jail at Greensboro because he was unable to meet his financial obligations—Judge Archibald D. Murphey; and Robert Morris, who financed the patriot cause in our Revolution, languished for years in jail for debt thereafter. We have certainly traveled far from that in these one hundred years.

More than that, we established in 1868 a system that was shocking to the reactionary shylocks, to whom the dollar was infinitely more precious than the liberty of the citizen, by creating "a homestead and personal property exemption" for the unfortunate debtor. He would be a rash man now who would attempt to repeal it. The world has moved in the last fifty years. We have not only emancipated the slave, given property rights to the women, and are about to give them also a share in the government, but we have freed the debtor.

The pages of our Reports show that we have not halted with these reforms, but we have set out upon a course that is to emancipate the children by giving them education in the public schools and by limiting the years within which they can be harnessed down to labor, and we are giving to the creators of the wealth of the State some recognition by limiting the hours of labor. We already have destroyed the mediaeval doctrine that an employee of a common carrier could not recover for injuries inflicted in the service if a fellow-servant contributed by his negligence in causing it.

More than that, in the last hundred years we have emancipated the people, or, rather, they have emancipated themselves, by making all officials elective, from constable to governor. Under the Constitution of 1776, enacted at Halifax, the people were trusted to elect only the members of the Lower House, just as the Constitution at Philadelphia eleven years later, entrusted to the people the election only of members of the House of Representatives. The magistrates were elected by the Legis-

lature, and the magistrates elected the county officers, except the clerk, who was appointed by the judge. Sixty years passed before we began to trust the people to elect their own agents by making the Governor elective. Twenty more years elapsed before we allowed the State Senators to be so chosen. Up to that time it was thought unsafe to permit any man to vote for State Senator unless he owned fifty acres of land. The judges and all the State officers, except the Governor, continued to be elected by the Legislature until half the century of this Court had expired, in 1868, and property qualifications were required for offices. Among others, the Constitution held a man unfit to be Governor unless he owned a freehold above a thousand pounds in value, nor fit to be a State Senator unless he owned three hundred acres of land. They intended to admit no Bolshevist into office. It is still held that women cannot hold any office or place under the State, but they in fact do hold several, and there is no disqualification of women to hold office in the Constitution or in any statute.

Numerous instances in which our State laws and decisions have been modernized have been stated by Judge Winston. It is hard for us to realize that the Constitution of the United States today is the oldest form of government in any civilized country. The only governments which have not been modernized since ours was created are the autocracy of the barbarous tribes in Central Africa and in the Pacific Islands. In no country today except ours is the Executive permitted to interfere with legislation by the representatives of the people by interposing his veto. This remnant of distrust of the capacity of the people for self-government has disappeared in every country save this. North Carolina in this particular stands ahead of all her sister States, for it is the only one which so far has refused to confer the veto power upon the Governor. Then, too, government in this country is the only one in which the Judiciary exercises, or has exercised, the veto power over the Legislative Department. This, however, is not conferred by the Constitution, either Federal or State, but is an assumption of authority by the ruling of the Court in its own favor in *Marbury v. Madison* in 1803. It was created by an ingenious process of reasoning in the *obiter dictum* in that case and, it is believed, as a bulwark for the protection of slavery against possible hostile legislation. Certainly it was never used against an act of Congress until (in another *obiter dictum*) in the *Dred Scott case* in 1857, which hastened the Civil War. After that war, aggregated wealth invoked instead the Fourteenth Amendment, enacted for the totally different purpose of protecting the newly emancipated negro, which it never did.

The assertion of the judicial veto in *Marbury's case* was promptly denied by President Jefferson, the leader of one great party, and later

by Abraham Lincoln, the leader of the other. Its adoption was most unfortunate for the courts. To quote an expression of Talleyrand, "It was worse than a crime; it was a blunder." It has made the composition of the courts ever since a matter of prime importance to aggregated wealth wherever judges are appointive. This Court extended it in *Hoke v. Henderson,* 15 N. C., 1, but this lead was not followed by any other State, and the soundness of the decision was denied by the U. S. Supreme Court. It remained a cause of friction between the legislative and the judicial department of the State government for seventy years until (after having been affirmed sixty times) it was overruled by *Mial v. Ellington,* 134 N. C., 131, in 1903.

Among the many excellencies of the law schools in this country there is one great defect which has been cured in but few of them, and that is the history of the law is not taught. Not only are students, as a rule, and therefore lawyers, uninformed as to the development of our State law so admirably traced by Judge Winston in his address, but they are misinformed as to the origin and development of the law in England. From the charming narrative of Blackstone, students have conceived an admiration of the so-called common law, which he tells us is the "perfection of reason," whereas though it may have been the best that could have been done by the judges who created it in a barbarous age, our progress consists in changing it in every way possible. So far from its origin being "as undiscoverable as the sources of the Nile," we know that it was simply "judge-made law."

In our training as lawyers we also received an entire misconception of Magna Carta, which was a reactionary instrument exacted by the barons to secure their local and personal privileges (among them was the right of hanging their retainers at will) against the extension of the jurisdiction of the King's Courts which had been created by the father of King John. Even so great an authority as the Supreme Court of the United States ought to be stated on one occasion that trial by jury was guaranteed by Magna Carta, and one writer has even said that it was "drawn by the great lawyers of England." The truth is, as we now know, that when Magna Carta was signed in 1215 there were no lawyers in England of any kind, but every person in any proceeding, civil or criminal, was required to appear in his own behalf. It was twenty-one years later, by the Statute of Merton in 1236, that authority was first given one to appear in court by a friend or agent to plead for him. It was not till seventy-six years after the Magna Carta that the Statute of Edward I. in 1291 gave authority for lawyers to act as professional agents for litigants or defendants by authorizing forty lawyers to be licensed for all England. The judges up to that time were priests, with now and then a layman, and for centuries later continued to be mostly

such. There was no law school in England by which lawyers could be educated professionally until 1758, nearly five centuries and a half after Magna Carta, when a briefless barrister who had failed at the bar was enabled by the gift of a layman to open the first law school in England at Oxford. His lectures have become famous as Blackstone's Commentaries. During all the centuries from 1291 till then, lawyers had prepared themselves by being articled as clerks to practicing lawyers, or picking up such crumbs of information as they could by attending the courts. The Inns of Court were not law schools but voluntary associations of law students.

As to trial by jury, there was none in England until 1351, one hundred and thirty-six years after Magna Carta, and the first juries were composed of the witnesses, who were to find the facts by reconciling their testimony. Hence juries were not at first always composed of twelve men, nor for a long time was unanimity required. It must be remembered, also, that during all the centuries from the Conquest down to Blackstone's day the records of the court were kept in dog latin, and for most of that time the opinions of the judges and the arguments of counsel were in Norman-French, which might well be styled pigeon-English. To add to the uncertainty, the opinions of the English judges, with rare exceptions, when the Court entered "*curia vult advisari*," were rendered hot foot, at the hearing, and there were no reasons given in writing. The reporters until very recently were never official, but always volunteers and subject to no revision. The records show that they frequently misconceived the reasons given by the Judges. The result is that many Reports have been justly characterized as almost valueless, and comparatively few can be depended upon as at all accurate. Opinions delivered orally, at the close of the argument, and in Norman-French, taken down by volunteer and often incompetent reporters, were naturally often misconceptions of what was said and done. The recent publication of the researches of Professor Vinogradoff and others in the archives of the courts are conclusive on this subject. It could not be otherwise when all the elements of uncertainty are considered. No wonder that with the misconceptions borne in on the profession by the teaching of Coke and Blackstone our courts became so much at conflict with the spirit of freedom and liberty that it has required constitutional amendments and so many statutes to make the necessary changes.

That the changes in the next hundred years will be greater still is inevitable. Even the foresight of Mr. Hicks cannot conceive them. Not only have the Constitutions of all countries been created or changed since that of the United States was adopted, but the method of changing them is different. In France and Germany, Italy and Spain, and other countries, when an amendment to the constitution is desired, it is not

made in the cumbersome way we adopted in 1787—out of fear to trust the newly emancipated people, who were then mostly uneducated—but in those countries and in probably all others except England a joint session of the two Houses of the lawmaking body is held and the amendment is then made by a majority vote.

There is, as I have said, no veto in any country but ours, either by the executive or by the courts, upon any legislation. In England it is not even necessary to have a joint session of the two Houses, but when a bill has passed three times through the Lower House in two consecutive sessions of Parliament it becomes a part of the constitution without the assent of the other House. How soon we shall reach this stage of progress in civilization we cannot tell. We only know that so far we have essentially changed the method of electing the Senate and cured by amendment some errors of the courts. It is very certain that the judicial veto upon legislation cannot much longer survive the discussion which has arisen over it in the absence of any provision in the Constitution or law conferring that power upon the courts. This power which the reactionary interests cling to as their last bulwark to stay progress and the extension of equal rights of all to share in the benefits of increasing wealth and of the comforts and opportunities of civilization will be as futile a barrier for them as to "attempt to dam the Nile with bulrushes." At present the Court has created itself a Privy Council by its own enactment, with the power to nullify the vote of the two Houses, though approved by the President or Governor.

In our own State it would seem quite clear that among early changes will be the abolition of the antiquated system of rotating the trial judges who, selected by one district, can yet preside over the other nineteen, whose people have had no part in their nomination. Another change which would seem extremely probable is to give force and effect to section 8 of Article I of our Constitution, which provides, "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." We know that, under the influence of former ideas, this paragraph and requirement is an absolute nullity.

The legislative is not separate and distinct, but is subject to the power of the judiciary to negative and destroy legislation, the only requirement being some ingenuity or skill in holding that a given feature of any act is not "due process of law," or not "according to the law of the land," or "not the equal protection of the laws," or some other reason "equally as good."

On the other hand, the judiciary has not control of its own department, for its procedure is prescribed or changed at will by the interference of the Legislature. In New York, where they first formulated the

new and simpler code of procedure drawn up by David Dudley Field in some 391 sections, it became the custom for every lawyer who lost a cause to rush to the Legislature to amend the procedure, so that today they have a code of more than 3,000 sections which is more complex and complicated than the absurd system which it was intended to succeed. In England they have proceeded according to the spirit of the provision in our Constitution (and the United States Congress, to a certain extent, is proposing to do the same) by authorizing the highest Court to formulate the procedure by rules of practice. In England the court has done this in sixty-three sections.

Not only are the courts thus interfered with by legislation in their procedure and practice, matters which pertain to the Court, but the executive interferes with matters strictly judicial, by ordering special terms, or the exchange of circuits, and by the use of the pardoning power, and in other ways. There should be either a bureau of justice, or the Court itself should be authorized to discharge these matters of which the judiciary are better informed, instead of relegating them to Executive action, which is foreign to such duties.

When these and some other changes are made each department will be separate and distinct, but not till then. At present there is hopeless interference by each of the three departments with the other two.

It is probable that in the future the anomaly of Federal judges being appointed, instead of elected by the people, and holding for life, which is unrepublican and autocratic, will be abolished. It is also probable that many of the grounds of jurisdiction in the Federal court, such as diversity of citizenship, shall be abolished, or else the spectacle of two concurrent jurisdictions, the Federal and the State courts revolving in the same orbit, will disappear by there being only one system of courts with appeals, instead of writ of error, from State courts to the United States Supreme Court, or at least there will be an abolition of Federal courts except for purposes of executing the law in purely Federal matters not involving questions of private right.

There will be still greater changes, which no man can prophecy, in law and its administration which will have been realized one hundred years hence.

Mr. Hicks mentions the suggestion of Hugo Munstenburg that some psychologist may invent a machine to tell when a man is lying. It would greatly shorten trials. A defendant, preparing to take the stand as a witness, asked his counsel, in some trepidation, if he thought this possible. His counsel said: "Huh, of course. I married one."

The English-speaking people are the only ones where recorded decisions are taken or have ever been held as authority. Everywhere else each case is decided as it arises upon its own merits, unbiased by what

other judges in other cases have said. In 1890 the volumes of Reports in English had already reached 8,000. Today there are nearly 35,000 volumes of Reports. This system is breaking down of its own weight. It cannot go on. Shall we substitute for it the system prevailing in other countries of not printing or quoting the decisions, and having instead codification similar to the Code Napoleon? If not, what shall we do? If an opinion or decision is erroneous, duplication and reduplication will not make it sound.

Great, as it seems to us, has been the change in laws and their administration in the one hundred years that have passed since this Court was created, it has been exceedingly small as compared with the progress in every other department of thought and of action. A hundred years ago steam railroads were undreamed of, and the transmission of intelligence by electricity, telephones, phonographs, ocean cables, wireless telegraphy and navigation of the air and other discoveries and inventions are so recent as still to be novelties. The human mind cannot foresee "all the wonders that shall be" in the next hundred years. A hundred years ago anesthetics were unknown and amputations were made without chloroform or ether. Even now antisepsis and sanitation are new. The progress in religious conceptions from the then still recent execution of witches, against abolition of which Blackstone protested, to these days when religion approximates somewhat nearer to the teachings of the Master, in the establishment of the Red Cross and of hospitals, freedom from work for children, the extension to them of education at the public expense, greater consideration for the poor and the recognition of the rights of women, as well as of inferior races, has taken the concrete form of governmental adoption. The battle of the Marne, besides its other results, will obtain the guarantee by the nations of the world of the protection of an historic race throughout Russia, Germany, Austria, and Turkey from a persecution which began on the day when "Mordecai the Jew sat in the king's gate," and at a woman's bidding salvation came in the order of protection sent by swift couriers to the one hundred and twenty provinces.

When this Court held its first session one hundred years ago, had some one predicted that in less than half a century the people would be trusted with the election of the Judges and all other officers from Governor to constable, that the negro would be emancipated and a citizen, that women would possess property rights, and that the ancient forms of legal practice and procedure would be swept away, it would have created consternation. But not as much as would be the case if one could stand here and foretell the conditions of government and of society which will exist when the second Centennial of this Court shall be celebrated. As the astronomers, by taking note of the direction from which our plane-

tary system drawn along by the great central orb 1,300,000 times as large as this little planet on which we live has rolled on its course with incredible speed, can tell us that the direction in which we are moving is towards the star Vega, which shines near the horizon to the northwest, so we can see in the great Declaration at Philadelphia in 1776, its adoption since in some form of the Rights of Man by all nations, its extension to the emancipation of subject races and the admission of women to a share in government, and still more in the limitation of the hours of labor, the minimum wage and other requirements, that we are traveling with increasing speed towards giving a greater and a more adequate share of the wealth they create to the labor that creates it. In the not distant future there will be no Rockefellers and Carnegies, no kaisers or kings, but a higher standard of living and more enjoyment of life for those who "make all things that are made and without whom nothing is made that is made." Privilege will pass. Equality of opportunity will prevail. The miter and the musket will no longer have a controlling share in government when the hammer and the level, the brain and the hand shall "rule in the realm which they have made."

If any one shall read one hundred years hence what is said here today they may find that we had at least some glimpse of the kingdom into which this generation, like the children of Israel of old, may not enter, and beyond which even in that day there will still lie an illimitable field—

> **The infinite world of man's last aspirations untrod,**
> **Save by the evening and the morn and the angels of God.**

INDEX

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words italics in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ABANDONMENT. See Corporations, 4.

ABROGATION. See Railroads, 16.

ACCELERATION. See Estates, 8, 11.

ACCEPTANCE. See Municipal Corporations, 1; Insurance, 3; Contracts, 5; Vendor and Purchaser, 4; Negotiable Instruments, 1.

ACCESSORY. See Homicide, 1.

ACCOMMODATION. See Bills and Notes, 4.

ACCOMPLICE. See Incest, 1; Homicide, 2.

ACCOUNTING. See Reference, 1.

ACCOUNTS. See Limitation of Actions, 7.

ACQUITTAL. See Statutes, 12; Criminal Law, 9, 10, 14.

ACTIONS. See Principal and Agent, 1; Animals, 1; Instructions, 1; Bills and Notes, 1; Judgments, 18; Railroads, 13; Parent and Child, 4; Deeds and Conveyances, 7; Contracts, 39.

1. *Actions—Time for Commencement—Limitation of Actions.*—Section 6 of the Federal Employers' Liability Act, providing that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued, is not in strictness a statute of limitation affecting only the remedy, but is a statutory condition of liability affecting the claimant's right of action which must have been complied with in order that he may sustain it. *Belch v. R. R.*, 22.

2. *Same—Nonsuit.*—Revisal, sec. 370, allowing a new action to be brought within twelve months after nonsuit, is inoperative where the Federal Employers' Liability Act controls the subject-matter, and will not be allowed to affect section 6 of the Federal act requiring, without exception or modification, that actions coming within its provisions shall not be maintained thereunder unless commenced within two years from the day the cause of action accrued; and the State statute may not extend the time of commencing such action for a greater period of time than the Federal statute allows. *Ibid.*

3. *Actions—Parties—Contracts—Negligence.*—The liability of a street car company to a railroad company under a contract for injuring the

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former's motorman in a collision at a crossing will not be considered in the motorman's action against the railroad company alone. *Dail v. R. R.*, 111.

4. *Actions—Possession—Courts—Jurisdiction.*—The writ of possession is not limited to actions of foreclosure of mortgages, but extends to all actions brought for the purpose of determining the rights of the litigants to the title or possession of real estate after judgment declaring such rights. *Lee v. Thornton*, 208.

5. *Same—Writs—Assistance—Mortgages—Sales.*—One either in possession or out of possession of lands may maintain a suit to set aside a deed thereto for fraud and undue influence, and in the same action recover possession of the lands and the rents and profits, and upon decree rendered in his favor may apply to the court, by supplemental petition, for such writ as will render the decree effective, usually a writ of assistance, and it is unnecessary to bring a second action therefor. *Ibid.*

6. *Actions—Consolidation—Deeds and Conveyances—Fraud—Writs—Assistance—Courts—Jurisdiction—Equity.*—Where a suit to set aside a deed for fraud and an accounting for rents, etc., and subsequently an action to obtain possession have been instituted, it is proper for the court to consolidate them, the rights of the parties being determinable in the first action under our system of administering equity and law in the same court. *Ibid.*

7. *Actions—Nonsuit—Torts—Joint Tort Feasors—Appeal and Error.*—An action against tort feasors may be maintained against either, or both, at the election of the party injured, and a nonsuit as to one of them is not error as to the other. *Raulf v. Light Co.*, 692.

ACTUS DEI. See Carriers of Freight, 2.

ADMINISTRATION. See Limitation of Actions, 1.

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ADMISSIONS. See Wills, 2; Judgments, 8, 9; Justices of the Peace, 2; Pleadings, 5, 6; Appeal and Error, 16, 37, 38; Limitation of Actions, 5; Evidence, 42.

ADOPTION. See Constitutional Law, 3.

ADVERSE PARTIES. See Witnesses, 1.

ADVERSE POSSESSION. See Easements, 1; Pleadings, 6; Limitation of Actions, 4, 58; Partition, 2; Husband and Wife, 11, 14.

AFFIDAVITS. See Witnesses, 1.

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ANCIENT DOCUMENTS. See Evidence, 33.

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ANIMALS. See Assumpsit, 2.

1. *Animals—Dogs—Property—Statutes—Actions.*—While, at common law, dogs were not considered as having such pecuniary value as to make them subjects of larceny or to be classed and dealt with as estrays; and while they are not now to be regarded as "stock," within the meaning of our statute (Revisal, sec. 1681) as to impounding stock, their position, as to larceny, has been changed in reference to listed and tax-paid dogs, and it is held that they are so far the subjects of property as tame domestic animals of value that the ordinary civil remedies are available to the owners, and they may maintain an action to recover them. *Meekins v. Simpson*, 130.

2. *Same—Limitation of Actions.*—The finder of lost property, a dog in the present instance, as a bailee without compensation, holds for the benefit of the owner, when ascertained, and the statute of limitations in bar of recovery of the possession will not commence to run against the true owner until demand and refusal, or the exercise of some unequivocal act of ownership inconsistent with the true owner's right, especially where the finder of the property may have found the true owner by the exercise of reasonable diligence, and has testified he was holding the property for him. *Ibid.*

ANNUALLY. See Wills, 11.

ANSWERS. See Appeal and Error, 44, 45.

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APPEAL AND ERROR. See Evidence, 1, 3, 7, 13, 18, 25, 26, 35, 41; Instructions, 1, 2, 3, 9; Railroads, 4, 7, 17, 18; Trusts and Trustees, 8; Courts, 1, 2, 5, 6; Vendor and Purchaser, 25; Ejectment, 2; Electricity, 3; Taxation, 5; Carriers of Passengers, 4; Actions, 7; Receiving Stolen Goods, 1; Criminal Law, 13.

1. *Appeal and Error—Judgments—Motions—Excusable Neglect—Findings—Meritorious Defense—Duty of Defendant.*—The action of the trial judge in setting aside a judgment for excusable neglect will not be sustained on appeal, in the absence of a proper finding of a meritorious defense; the burden of this finding being upon the defendant, appellee. *Cahoon v. Brinkley*, 6.

2. *Appeal and Error— Witnesses— Evidence— Commission—Adverse Parties—Examination—Statutes.*—An appeal will directly lie from an order of the Superior Court, duly excepted to, denying to a party his right to be present at the examination of his adversary before a commissioner appointed for the purpose, under the provisions of Revisal, secs. 865, 866. *Cartwright v. R. R.*, 37.

3. *Appeal and Error — Harmless Error — Insurance — Parol Evidence — Writing—Independent Fact.*—Where the insured has had done all that

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is required of him by the rules and regulations of the insurance company to change the beneficiary of his policy, testimony of the proper officer of the company that the written application had been received at his office, if incompetent, is harmless error. *Wooten v. Order of Odd Fellows*, 53.

4. *Appeal and Error— Objections and Exceptions— Evidence— Motion to Strike Out.*—Where competent and incompetent evidence is given on the trial of an action, the refusal of a motion to strike out the whole is proper, as the objection will not be confined to the incompetent part by this Court on appeal. *Ibid.*

5. *Appeal and Error—Harmless Error—Evidence—Result.*—Incompetent evidence, admitted on the trial, will be considered as harmless error, on appeal, when it is not of sufficient importance to have affected the result. *Ibid.*

6. *Appeal and Error—Carriers of Passengers—Ejecting Passenger—Negligence—Evidence—Trials.*—Where judgment has been rendered against a railroad company upon a trial directed solely to the question of the actionable negligence of the conductor in ejecting the plaintiff's intestate, a passenger upon his train, at a dangerous place while in a drunken and helpless condition, the result will not be affected, on appeal, by the lack of evidence of negligence of the employees on a following train of the defendant, which struck and killed him. *Lee v. R. R.*, 95.

7. *Appeal and Error—Evidence—Prejudice—Harmless Error.*—Testimony that is irrelevant, uncertain, and indefinite, and which does not appear to have prejudiced the appellant's right, and which could not have influenced the verdict, will not be considered as reversible error on appeal, nor will unanswered questions be so considered unless it is in some sufficient way made to appear to the court that their exclusion was prejudicial to his rights. *Perry v. Mfg. Co.*, 69.

8. *Appeal and Error—Writ of Error—When Granted—Supreme Court.*—A writ of error to the Supreme Court of the United States should be applied for to the presiding officer of the State court, under the Federal statute, within three months after the rendition of the judgment or decree complained of, and not to the court. *R. R. v. Horton*, 115.

9. *Appeal and Error—Issues—Answers— Record— Interpretation—Harmless Error.*—The objectionable form of an issue, answered by the jury, need not necessarily result in a new trial; and when it appears by reading the verdict, in the light of the whole record, that no prejudicial error has been committed, the verdict thereon will not be disturbed on appeal. *Land Co. v. Maxwell*, 140.

10. *Same— State's Lands— Entry— Protest—Grants—Title—Instructions—Trials.*—When it appears that the issue submitted is directed to the seizin and possession of the protestant claiming under a prior entry to State's lands, but that the charge of the court put the burden upon the enterer to show, by the greater weight of the evidence, that the prior grant, at the time it was originally issued, did not cover the *locus in quo* and made his right to recover depend thereon: *Held*, the case having been tried upon the correct principle, the objectionable

APPEAL AND ERROR—*Continued.*

form of the issue would not alone warrant an order for a new trial. *Walker v. Parker*, 169 N. C., 155, cited, approved, and applied. *Ibid.*

11. *Appeal and Error — Evidence — Objections and Exceptions — Harmless Error.*—The exclusion of evidence of a grant of State's lands to the United States Government, offered by the protestant for the purpose of showing sufficient adverse possession to confer title, is immaterial, upon the trial of a protest to an entry of State's lands, when there is nothing to show that this part of the land interfered with the entry protested. *Ibid.*

12. *Appeal and Error—Evidence—Maps—State's Lands—Entry—Protest—Harmless Error.*—When the map has been introduced in evidence upon a trial protesting an entry of State's land, testimony of a witness, upon information, as to a beginning corner, is immaterial, if objectionable, when from the map this corner is self-evident, and the evidence could not have had any appreciable effect on the trial. *Ibid.*

13. *Appeal and Error—Divided Court—Judgments—Bank and Banking—Deposits—Claimant—Notice—Issues—Answers—Opinions.*—The matters for decision on this appeal are whether the defendant bank is responsible to the true owner for paying the depositor, under the facts of this case, after notice given to it by owner that the money was her own, and not that of the depositor; and whether the findings to the issues submitted were irreconcilable and a new trial should be ordered. The Court being equally divided, BROWN, J., not sitting; CLARK, C. J., writing an opinion; HOKE, J., concurring; WALKER and ALLEN, JJ., each writing a dissenting opinion. The judgment of the lower court is affirmed without being a precedent. *Miller v. Bank*, 152.

14. *Appeal and Error— New Trial— Evidence— Tort.*—When the Supreme Court, on appeal, has only decided that an instruction of the lower court, in effect, that the defendant would not be liable for damages in trespass for its grantee's cutting other trees than those it had conveyed, was erroneous, the question of whether the defendant participated in the alleged wrongful act was left open for the new trial, and evidence relating thereto may be introduced thereon, the competency of such to be then passed upon. *Williams v. Lumber Co.*, 174.

15. *Appeal and Error—Supreme Court—Opinion Certified—Courts—Jurisdiction—Petition to Rehear.*—After a decision of the Supreme Court has been certified down, the Court is without jurisdiction to entertain a motion to recall the mandate and judgment rendered and reconsider it; the only method for such being upon petition to rehear, filed according to the rules. *Davis v. R. R.*, 186.

16. *Appeal and Error— Records— Judgments— Admissions.*—An admission stated in the judgment, appearing in the record of the case on appeal is controlling. *Southerland v. Brown*, 187.

17. *Appeal and Error — Costs — Prejudicial Error.*—The appellant cannot reasonably complain, on appeal, that he has been taxed with a part of the costs, when on the trial the principal issue has been decided against him. *Jones v. Williams*, 245.

18. *Appeal and Error — Evidence — Experts — Findings — Presumptions.*—Where, under a general objection to his evidence, a witness has testi-

APPEAL AND ERROR—*Continued.*

fied as an expert, and it appears from the record that he is fully qualified, it will be presumed, on appeal, that the preliminary finding of the trial judge that the witness was an expert had been made or that the appellant had waived it. *Jones v. R. R.*, 262.

19. *Same—Opinion Evidence—Record.*—Where, in an action by an employee against a railroad company to recover damages for a personal injury, the proper stopping of a train by the use of air brakes, etc., is material to the inquiry, and it appears from the record on appeal that a witness was an experienced engineer, qualified by training and experience to express an opinion thereon by his use of engines and appliances exactly similar in structure and operation to that used in the instant case, and calculated to aid the jury to a correct conclusion: *Held*, his estimates and statements of the correct use of such appliances are as to facts relevant to the issue and properly received in evidence, whether in strictness expert evidence or not. *Ibid.*

20. *Appeal and Error—Fragmentary Appeal.*—An appeal from an order disallowing a preference claimed in the funds in a receiver's hands over other claims filed, and retaining the cause for further orders for its distribution, is fragmentary, and the exceptions will be reserved to be passed upon on appeal from final judgment. *Joyner v. Reflector Co.*, 274.

21. *Appeal and Error—Objections and Exceptions—"Broadside" Exceptions.* Where objectionable and unobjectionable evidence is covered by only one exception, the exception, on appeal, will not be confined to that which is objectionable, or considered. *Pope v. Pope*, 283.

22. *Appeal and Error—Evidence, Irrelevant.*—In an action by an employee to recover damages involving only the negligent failure of the employer to furnish sufficient help for the work he was required to do, an answer of a witness that the employer had generally furnished sufficient tools could have no effect upon the verdict, and was without prejudice to the defendant's rights. *Beaver v. Fetter*, 334.

23. *Appeal and Error—Evidence—Objections and Exceptions.*—Where the witness has already, and without objection, testified to certain matters of evidence, an objection thereafter made to the same evidence will not be considered upon exception and appeal. *Ibid.*

24. *Appeal and Error—Attorney and Client—Attorneys' Fees—Guardian and Ward—Costs.*—In this case the attorneys for the ward successfully prosecuted his action against his guardian, and the Superior Court judge properly allowed them a fee, but in double amount of that finally allowed on appeal by the guardian: *Held*, one-half the costs on appeal were taxable against the guardian individually and the other against the attorneys. *In re Stone*, 337.

25. *Appeal and Error—Judgments—Collateral Attack.*—The correction of a final judgment for error rendered by a court having jurisdiction over the parties and subject-matter is by appeal, and it may not be collaterally attacked except for fraud, collusion, etc., or when it is void and its invalidity appears upon its face. *Mann v. Mann*, 353.

26. *Appeal and Error—Superior Court—Judgments—Refusal to Allow—Amendment—Several Grounds—Reasons Assigned—Assignments of*

APPEAL AND ERROR—*Continued.*

Error.—Where the trial judge has given one of several valid reasons for refusing to amend a former judgment upon petition in the cause, the Supreme Court, on appeal, is not confined to the sole ground of his refusal, and may sustain him upon the others properly appearing in the record. *Ibid.*

27. *Appeal and Error — Fragmentary Appeals.*—The Court suggests that fragmentary appeals be not permitted. *Yates v. Ins. Co.*, 401.

28. *Appeal and Error—Case—Service—Time Extended—Agreement—Statutes.*—An appeal to the Supreme Court will not be dismissed on the ground that the case was not served by the appellant within the statutory time, when the record shows that an extension thereof had been agreed upon, and service of the case had been accepted by the appellee within the extended period. *Sanford v. Junior Order*, 443.

29. *Appeal and Error—New Trial—Court's Discretion—Newly Discovered Evidence.*—In the absence of its abuse, the exercise of the discretion of the trial judge in granting a new trial after verdict for newly discovered evidence is not reviewable on appeal. *Ibid.*

30. *Appeal and Error—New Trials—Findings.*—The findings of the trial judge upon which he has ordered a new trial upon an additional issue to those submitted are not reviewable on appeal. *Ibid.*

31. *Appeal and Error—Objections and Exceptions—Courts—Expression of Opinion—Statutes.*—Objection that a remark made by the judge to the jury during the trial was an expression of his opinion, prohibited by the statute, should be taken at the time the remark was made. *Smith v. Comrs.*, 466.

32. *Appeal and Error—Objections and Exceptions—Evidence.*—Exceptions to the admission of evidence that has already been substantially given by the witness will not be sustained on appeal. *Ibid.*

33. *Appeal and Error—Evidence—Unanswered Questions.*—Error assigned to the exclusion of unanswered questions, without making it to appear what these answers would have been, will not be considered on appeal. *Ibid.*

34. *Appeal and Error—Venue—Objections and Exceptions—Title—Removal of Causes — Transfer of Causes — Motions.*—An appeal directly lies from the refusal of the trial judge to grant a motion to remove an action involving title to land to the county in which the land is situated. As to whether the right will be preserved by exception alone, *Quære? Griffin v. Barrett*, 473.

35. *Appeal and Error—Harmless Error—Rape of Child—Seduction of Child —Age.*—Where it appears, in an action brought by the father to recover damages against one for debauching his daughter, that the case has been tried below upon the contentions only as to whether the daughter was twenty years of age at the time or only eighteen years, a charge of the court to the jury erroneously placing upon the defendant the burden of showing the woman's age is harmless and will not entitle the defendant to a new trial. *Tillotson v. Currin*, 479.

36. *Appeal and Error—Excluded Answers—Prejudice.*—It must be shown on appeal that excluded answers to questions were prejudicial in order to constitute reversible error. *Ibid.*

APPEAL AND ERROR—*Continued.*

37. *Appeal and Error— Evidence— Admissions— Trials.*—The party introducing evidence cannot complain thereof because it was not what he expected, or was unfavorable to him. *Hudson v. R. R.*, 488.

38. *Appeal and Error— Evidence— Admissions— Harmless Error.*—Exceptions to evidence admitted on the trial which could not have appreciably affected the result of the verdict will not be held for reversible error on appeal. *Ibid.*

39. *Appeal and Error—Verdict—Harmless Error.*—Errors committed on the trial as to issues answered in appellant's favor are cured by the verdict. *Warehouse Co. v. Chemical Co.*, 509.

40. *Appeal and Error—Objections and Exceptions—Evidence—Ground of Exception—Statement by Court.*—Upon the trial of an action to recover lands there was evidence that the father of the plaintiffs, A., and the defendant, S., took the lands by devise from their father, with provisions that they should care for their mother until her death; that A. moved West after the death of his father, and that S. remained with his mother until her death. S. offered to show by his witness the declarations of A. before he moved away, which were excluded by the judge, under his statement that they were incompetent if for the purpose of proving a conveyance of the land: *Held*, the evidence for that purpose was incompetent, and it devolved upon the defendant to state any other ground upon which he had offered it, if any he had, for his exception to have consideration thereon. *Gibson v. Terry*, 534.

41. *Appeal and Error—Objections and Exceptions—Unanswered Questions —Record.*—Exception to the exclusion of questions asked a witness upon the trial must show, in some proper way, the relevancy and bearing the expected answers would have on the controversy, so that the Supreme Court may determine whether the appellant has been prejudiced, or the exception will not be considered. *Ibid.*

42. *Appeal and Error— Findings— Consent— Evidence.*—Where, by agreement, a jury trial has been waived by the parties to an action and, by consent, the judge has found the facts upon the evidence, his findings are not reviewable upon appeal when supported by the evidence. *Caldwell County v. George*, 602.

43. *Appeal and Error—Evidence—Competent in Part—Objections and Exceptions.*—Exceptions to evidence which is competent in part will not be sustained on appeal. *Ibid.*

44. *Appeal and Error— Verdict— Judgments—Issue—Answers.*—Where the verdict of the jury has been adverse to the appellant upon two issues, either one of which is determinative of the controversy, the judgment accordingly rendered upon one of them alone will not be disturbed on appeal. *Patrick v. Ins. Co.*, 661.

45. *Appeal and Error — Issues — Answers.*—An exception based upon an issue answered in appellant's favor will not be sustained on appeal. *Plemmons v. Murphy*, 671.

46. *Appeal and Error— Insurance, Fire— Policy— Contracts— Evidence.*— The admission in evidence of letters informing an insurer of a loss by fire covered by its policy cannot be considered as prejudicial to it, in

APPEAL AND ERROR—*Continued.*

an action to recover the loss, when the subject-matter of the letters was not in dispute. *Proffitt v. Ins. Co.*, 680.

47. *Appeal and Error—Record—Evidence—Letters.*—Prejudicial matter to the appellant's rights must appear of record, on appeal, and exception to the admission of letters as evidence will not be considered when their subject-matter is not disclosed. *Ibid.*

48. *Appeal and Error—Evidence—Motions—Nonsuit—Grounds Stated for Motion.*—Where, upon a motion to nonsuit upon the evidence, the appellant states the ground for his motion in the trial court, he will be confined to the grounds so stated on appeal. *Ibid.*

49. *Appeal and Error—Issues—Answer to One—Complete Bar—Exceptions.* Where appellant, plaintiff, does not allege error as to an issue, the answer to which is a complete bar to his right of action, exceptions to other issues need not be considered on appeal. *Lamb v. Holloman*, 686.

50. *Appeal and Error—Verdict—Judgment—Landlord and Tenant—Leases—Counterclaim.*—Where the leased building has not been completed or ready for occupancy at the time stated in the contract, and in the lessor's action to recover the rent the lessee alleges as a counterclaim that he had been obliged to rent another building at the same rental price and had paid, under protest, the rent to the plaintiff during that period, a verdict of the jury upon the evidence and under proper instructions, allowing both the demand and the counterclaim, renders immaterial and irrelevant the answer to an issue as to the payment under protest, ratification, etc., and a just verdict and judgment thereon having been established, they will not be disturbed on appeal. *Herring v. Wall*, 688.

51. *Appeal and Error—Modification of Judgment by Consent—Case Remanded—Costs.*—Where the parties have agreed to a modification of the judgment appealed from, the cause will be remanded to the Superior Court to be proceeded with accordingly, taxing the cost of appeal upon them equally. *Stokes v. Hill*, 697.

52. *Appeal and Error—Evidence—Verdict—Instructions—Trials.*—Exception that the verdict or instructions to the jury was not supported by the evidence, upon a phase of the controversy upon which the trial had proceeded without objection, comes too late after verdict. *Wilkerson v. Pass*, 698.

53. *Appeal and Error—Evidence—Harmless Error.*—The trial judge cures evidence erroneously admitted by striking it out, so informing the jury and instructing them not to consider it. *Raulf v. Light Co.*, 691.

54. *Appeal and Error—Instructions—Correct as a Whole—Harmless Error.* Where a charge construed as a whole does not prejudice the appellant's rights, error as to fragmentary parts will not be held as reversible. *Ibid.*

55. *Appeal and Error—Objections and Exceptions—Restrictive Evidence—Criminal Law.*—Where a witness, charged with a crime, has taken the stand in his own behalf, and the State has introduced evidence of his bad character, he may not complain that it was not restricted to his character as a witness, unless he has asked at the time of its admis-

APPEAL AND ERROR—*Continued.*

sion that it be so restricted. (Supreme Court Rule No. 27.) *S. v. Atwood*, 704.

56. *Appeal and Error — Instructions — Prejudicial Error.*—On appeal, the charge of the trial judge will be construed as a whole; and when, thus construed, the appellant's rights have not been prejudiced, error in parts thereof will not be held as reversible. *S. v. Wentz*, 746.

57. *Same—Homicide—Affray—Self-defense.*—Where, upon the evidence on a trial for homicide, the judge has fully, clearly and accurately charged the jury as to murder, manslaughter, and self-defense, an instruction upon the question as to whether the defendant entered into the fight willingly, relating to an affray, also involved in the controversy, will not be construed as depriving the prisoner of his right of self-defense, when, if the charge is construed as a whole, it does not so appear and it is not prejudicial to the prisoner. *S. v. Pollard*, 168 N. C., 116, and *S. v. Baldwin*, 155 N. C., 494, cited and distinguished. *Ibid.*

58. *Appeal and Error—Objections and Exceptions—Briefs.*—Exceptions not insisted upon in appellant's brief will be deemed as abandoned on appeal. *S. v. Wilson*, 741.

59. *Appeal and Error — Objections and Exceptions — Grounds Stated.*—On appeal, the appellant is restricted to the ground of objection to the admission of evidence he has given on the trial of the cause in the lower court. *Ibid.*

60. *Appeal and Error— Objections and Exceptions— Evidence— Competent in Part.*—An objection to the admission of evidence that is competent in part, without particularizing and excepting to the incompetent part, is untenable on appeal. *Ibid.*

61. *Appeal and Error—Evidence—Prejudicial Error—Harmless Error.*—An unresponsive answer by a witness to a question which could not have had appreciable significance on the result of the trial will not be held reversible error on appeal. *S. v. McIver*, 719.

62. *Appeal and Error—Evidence—Questions and Answers.*—Where the answer to a question, objected to and excluded, was not given, it must be made to properly appear on appeal that the evidence sought would have been of material value to the appellant, so that the court may see that its exclusion has been prejudicial to him. *S. v. Spencer*, 709.

63. *Appeal and Error—Jurors—Challenge—Prejudicial Error.*—Where exception is taken to the permission of the court allowing a party to the action to challenge a juror after he had passed him, the objecting party must show that he had exhausted his challenges or had in some way been prejudiced, in order that reversible error may appear on his appeal. *S. v. Carroll*, 730.

64. *Appeal and Error—Evidence—Questions and Answers.*—On appeal from the exclusion of an answer to a question, the character of the evidence excluded must appear, so the court may see and determine whether prejudicial error had therein been committed. *Ibid.*

APPLIANCES. See Electricity, 1.

APPROVED APPLIANCES. See Electricity, 2.

APPURTENANCES. See Deeds and Conveyances, 8, 9.

ARCHITECTS. See Mechanics' Liens, 2.

ASSESSMENTS. See Drainage Districts, 1, 3, 4, 5, 6, 8, 9.

ASSIGNMENT. See Parties, 1.

ASSIGNMENT OF ERROR. See Appeal and Error, 26.

ASSIGNMENTS OF BID. See Contracts, 26; Sales, 2.

ASSUMED NAME. See Statutes, 2, 3; Partnership, 5.

ASSUMPSIT.

1. *Assumpsit—Lost Property—Liens—Evidence.*—While the finder of lost property may sustain a demand in *assumpsit*, or by way of counterclaim, for the reasonable costs and expenses necessary to the preservation and return of the property to the true owner, no lien attaches to the property therefor, especially in the absence of an offer of reward for its return; and where the title to the property is the sole issue, evidence as to such costs and expense are properly excluded. *Meckins v. Simpson*, 131.

2. *Same—Dogs—Animals.*—While the finder of a lost dog may recover of the owner such reasonable costs and expenses as he may have incurred therein, the demand should not be readily allowed without clear evidence of particular existing conditions which would warrant it. *Ibid.*

ASSUMPTION OF RISKS. See Pleadings, 1; Railroads, 5, 7; Negligence, 14; Master and Servant, 8.

ATTORNEY AND CLIENT. See Judgments, 2, 5, 7; Appeal and Error, 24; Courts, 4; Guardian and Ward, 1.

ATTORNEY-GENERAL. See Statutes, 5.

AUTOMOBILES. See Nuisance; Principal and Agent, 8; Criminal Law, 8.

AWARD. See Habeas Corpus, 5.

BALLOTS. See Election, 13; Taxation, 9.

BANKS AND BANKING. See Appeal and Error, 13; Bills and Notes, 3.

1. *Banks and Banking—Bills and Notes—Ultra Vires Acts—Statutes—Inland Bills—Drafts—Negotiable Instruments.*—Where a draft drawn to the maker's order and, having been endorsed by another, is accepted at a bank, and then purchased, in due course, before maturity, by an innocent purchaser for value, the bank may not resist payment upon the ground that the transaction was *ultra vires*, and not within the authority of its charter, authorizing it to accept bills, notes, commercial paper, etc., for it comes within the statutory definition of an inland bill of exchange, Revisal, secs. 2276, 2279, and may be treated as a bill or note, at the option of the holder. *Sherrill v. Trustee*, 591.

2. *Banks and Banking—Bills and Notes—Ultra Vires Acts—Due Course.* The purchase by a bank of a draft drawn to the maker's order and endorsed by another is not foreign to the purposes of its charter authorizing it to accept bills, notes and other negotiable paper, conceding it not to be within the powers expressly conferred, and the bank is liable thereon to its innocent purchaser for value. *Ibid.*

BANKS AND BANKING—*Continued.*

3. *Banks and Banking—Bills and Notes—Ultra Vires Acts—Consideration—Retained—Due Course—Innocent Purchaser.*—The defense of *ultra vires* by a bank to its liability upon a draft payable to the maker's order, sold to an innocent third person for value, where the bank has retained the purchase money, without offer to restore it, is untenable, there being nothing in the transaction that is either illegal or against public policy. *Ibid.*

BAR TO ACTION. See Appeal and Error, 49.

BASTARDY. See Slander, 1.

BENEFICIARIES. See Insurance, 6; Mechanics' Liens, 5; Wills, 6; Trusts and Trustees, 17.

BENEFITS. See Drainage Districts, 3.

BETTERMENTS.

1. *Betterments—Statutes—Color of Title—Good Faith—Reasonableness—Issues—Title—Evidence—Questions for Jury—Trials.*—Under our statute (Revisal, sec. 652), one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover betterments in an action by the true owner to recover the lands; answers to the issues as to the title alone being insufficient, the *bona fides* of the belief and its reasonableness being for the determination of the jury upon the entire evidence. The appropriate issues are suggested by the court. *Pritchard v. Williams*, 108.

2. *Betterments—Statutes—Use and Occupation—Limitation of Actions.*—Where one in possession of lands is entitled to recover against the true owner for betterments he has placed thereon, he will be charged with the use and occupation of the land without regard to the three-year statute of limitation. Revisal, sec. 653. *Ibid.*

BILLS AND NOTES. See Judgments, 8; Justices of the Peace, 1; Contracts, 13; Subrogation, 1; Sunday, 1; Corporations, 5; Fraud, 2; Limitation of Actions, 6; Banks and Banking, 1, 2, 3; Principal and Agent, 11; Bonds, 1.

1. *Bills and Notes—Interest—Maturity—Actions.*—Interest due and payable under the terms of a written instrument may be recovered in an action before the principal sum has become due. *Parker v. Horton*, 143.

2. *Bills and Notes—Negotiable Instruments—Intervenor—Due Course—Burden of Proof.*—The burden of proof is on the intervenor, claiming in attachment proceedings to be the owner by endorsement of a draft, the subject of the litigation, in due course, to show by the preponderance of the evidence that he was the purchaser of the draft without notice of any infirmity, etc.; and when the endorsement has been admitted, but the ownership in due course has been denied, the question is one of fact for the determination of the jury. *Moore v. Milling Co.*, 407.

3. *Bills and Notes—Negotiable Instruments—Banks and Banking—Intervenor—Due Course—Evidence—Trials.*—The intervenor bank claimed

BILLS AND NOTES—*Continued.*

to be the owner of a draft, the subject of attachment proceedings, in due course, and the evidence tended to show that the maker had an active account at intervenor's correspondent bank, where the draft was deposited, which sent it, with other items for collection, to the intervenor bank; the words, "collection number," etc., appearing upon the draft in question, and that the intervenor had received this draft under a general agreement to charge its correspondent with interest until paid: *Held*, sufficient to take the case to the jury upon the question of whether the intervenor took the draft as a purchaser or for collection. *Ibid.*

4. *Bills and Notes—Husband and Wife—Joint Makers—Accommodation—Endorser—Liability.*—Where a husband and wife are joint makers of a note, their liability, as between themselves, is one-half of the full amount, nothing else appearing, though as between them and the payee or an accommodation endorser it is in the total amount of the obligation. *Wilson v. Vreeland*, 505.

BILLS OF LADING. See Carriers of Freight, 1.

BLOODHOUNDS. See Criminal Law, 4.

BONDS. See Road Districts, 5.

1. *Bonds—Municipal Corporations—Bills and Notes—Presentment for Payment—Delays—Payee's Request.*—Where non resident bidders for an issue of county bonds, through their authorized agent, has put up their checks required as a condition precedent, as evidence of good faith, and later request a special act of the Legislature to be passed to give the bonds validity, and also a decision of the Supreme Court decision thereon, evidence that they acted throughout with the county commissioners to produce the result they requested is sufficient evidence that they had not withdrawn their bid, and their checks given for the faithful performance of their obligations, presented for payment within a reasonable time thereafter, are subject, in an action brought by the county, to the damages sustained by reason of a resale of the bonds, made necessary by their conduct. *Caldwell County v. George*, 602.

2. *Same—Principal and Agent.*—Where the authorized agent of nonresident bidders for an issue of county bonds has endorsed the notes of his principal required as a condition precedent, and given his own note, with his principal's endorsement, as a pledge of their good faith in making the bid, and has actively participated in and requested the delays necessary to satisfy his principal as to validity of the bonds, his endorsement and note carries with them a personal liability, and his conduct is evidence that his liability has not ceased or the bid withdrawn, and the county may maintain a personal action to recover on the notes given, to the extent of its loss occasioned by its being forced to make a resale of the bonds. *Ibid.*

BOTTLING. See Vendor and Purchaser, 2.

BOUNDARIES. See Deeds and Conveyances, 1.

BREACH. See Judgments, 11; Contracts, 29, 40, 41.

BRIEFS. See Appeal and Error, 58.

BUILDINGS. See Contracts, 40, 42.

BURDEN OF PROOF. See Wills, 2, 3; Negligence, 1; Evidence, 4; Mortgages, 1; Vendor and Purchaser, 2; Ejectment, 2; Railroads, 17; Trusts and Trustees, 15, 16; Criminal Law, 3; Homicide, 9; Limitation of Actions, 1; Elections, 6; Bills and Notes, 2; Carriers of Freight, 3; Parent and Child, 3.

CARRIERS OF GOODS. See Carriers of Freight.

1. *Carriers of Freight—Railroads—Perishable Freight—Negligence—Contracts—Cold Damage.*—A carrier of interstate freight may not contract against the result of its own negligence, under the Cummins Amendment, United States Compiled Statutes, par. 8604a; and its defense that a shipment of sweet potatoes was received at the owner's risk of freezing will not relieve the carrier from the payment of damages so caused. *Bivens v. R. R.*, 414.

2. *Same—Transportation—Unreasonable Delay—Freezing—Actus Dei.*—Where a shipment of sweet potatoes is suddenly caught in cold weather by reason of the carrier's negligent delay in transporting them, and frozen and rendered worthless in consequence, it is the carrier's negligence that has caused the damage, and not *actus dei.*—*Ibid.*

3. *Carriers of Freight—Railroads—Perishable Freight—Care in Shipment—Burden of Proof—Negligence.*—It is the carrier's duty to load perishable goods in proper cars, and to take reasonable care for their preservation and delivery in time to prevent loss; and in an action to recover damages for a loss thereto, arising from an unreasonable delay in transportation, the burden is on the carrier to show it had exercised the care required of it. *Ibid.*

4. *Carriers of Goods—Commerce—Federal Statutes—Notice of Claim—Bills of Lading.*—The Federal statutes controlling a recovery of damages to an interstate shipment by common carriers, on a through bill of lading, amendatory to the Carmack Amendment, and also the Cummins Amendment to the Interstate Commerce Act, vol. 38, Part I, U. S. Statutes at Large, ch. 176, page 1196-7, while recognizing the rights of the carrier, in proper instances, to stipulate for the presentation and filing of claims within a stated period, restricting such rights to a period of ninety days in one instance and four months in another, further provides that if the loss, damage or injury is due to delay in transit by carelessness or negligence, then no notice or filing of claim shall be required as a condition precedent to recovery; and where a connecting carrier has caused damages to a shipment in a manner coming within the terms of the last named proviso and action therefor has been commenced within two years, as the statute requires, against the initial carrier, giving a through bill of lading, the defendant is deprived of any defense which might arise from failure of plaintiff to give the notice stipulated for in the bill of lading and otherwise coming within the terms of the Federal statutes, and the plaintiff may recover damages to the shipment caused by a connecting carrier alone. *Mann v. Transportation Co.*, 104.

5. *Carriers of Goods—Freight Rates—Legal Rates—Agreements—Federal Statutes—Interstate Commerce Commission—Corporation Commission.* The rates of transportation allowed carriers of freight are those established by the Interstate Commerce Commission, under the Federal

CARRIERS OF GOODS—*Continued.*

statutes as to interstate commerce, and by the State Corporation Commission, under the State statutes as to intrastate commerce, which may not be affected by any agreement to the contrary between the carriers or their agents or employees and the shipper; and, notwithstanding such agreement, the carrier may demand and enforce the rates established by law. *R. R. v. Latham*, 417.

6. *Same — Intermediate Points — Credit Allowances — Discrimination.*— Where, under legally established tariffs, a shipper is allowed as a credit upon the amount of full transportation charges, on a certain commodity, freight he had prepaid to a certain intermediate point, by way of an "expense bill," and to be established in a specified way, but requiring that the further transportation to destination be made before a certain date in each year, any agreement made to the contrary between the carrier and the shipper, respecting a later date than that allowed and established pursuant to the law, amounts to an unlawful discrimination, and is unenforcible. The objection that the pleadings in this case were directed solely to the agreement, and that recovery by the carrier should not therefore be allowed, is untenable. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers — Ejecting Passenger — Helpless Passenger — Drunkenness—Dangerous Place.*—Where there is evidence tending to show that a passenger on a railroad train was too drunk to get on without assistance; was moved by the conductor into the smoking compartment of the car; was too drunk to find the ticket he had purchased, and was put off by the conductor, after dark at a place to which he had paid a cash fare, with abusive words from him, where he was in danger, owing to his condition, from passing trains, and one of them ran over and killed him, it is sufficient to be submitted to the jury upon the actionable negligence of the conductor in thus ejecting a helpless passenger at a dangerous place; and testimony of ejaculations of passengers, in the conductor's presence and hearing, as to the passenger's helplessness upon the track, and his danger from passing trains, is competent upon the question of the knowledge of the conductor at the time. *Lee v. R. R.*, 95.

2. *Carriers of Passengers —Riding on Platform —Notice —Statutes.*—Revisal, sec. 2628, requires only that the notice to be placed by a railroad company in its coach, relieving the company from liability to a passenger injured while riding on the platform, etc., shall be in English, and the fact that such passenger cannot read that language is immaterial. *Bane v. R. R.*, 247.

3. *Same—Call for Station—Stopping Train—Verdict—Findings—Instructions—Proximate Cause.*—Where there is evidence tending to show that a passenger on a railroad train had left his seat in the coach, wherein the statutory notice (Revisal, sec. 2628) had been properly posted, after a station had been called, and was injured in a collision with a derailed car, while standing with one foot on the step of his car, slowly coming to a stop, and it appears that he would not have been injured had he remained seated in the coach, an answer to the issue as to the defendant's negligence in its favor, under a proper instruction as to the defendant's liability under the circumstances, in-

CARRIERS OF PASSENGERS—*Continued.*

cluding the principle as to the proximate cause, is a finding that the plaintiff's negligence was the proximate cause of the injury. *Ibid.*

4. *Carriers of Passengers— Electric Railroads— Negligence— Strangers— Reasonable Anticipation—Instructions—Trials—Appeal and Error.*—A common carrier is not responsible in damages for injuries resulting from the unauthorized acts of strangers or other passengers on its cars which it could not reasonably foresee or anticipate, in the exercise of ordinary care, under the circumstances; and where a passenger on an interurban electric railway sues to recover damages for an injury received, when he was alighting at his station, from the sudden and unexpected forward movement of the car, after it had come to a stop, and the evidence is conflicting as to whether it was caused by an employee ringing the starting signal or a drunken passenger on the car doing so, whose condition, from his appearance and demeanor, was not reasonably observable, or whose act could not reasonably have been anticipated, the refusal by the judge to specially instruct the jury upon this phase of the defense, upon a proper prayer duly tendered, constitutes reversible error. *Pride v. R. R.*, 594.

CERTIORARI.

Certiorari—Supreme Court of United States—By Whom Granted—Supersedeas.—A *certiorari*, provided as a substitute for the writ of error, is issuable within the discretion of the United States Supreme Court, and not by a justice thereof, and when the application therefor has been granted a *supersedeas* may issue as ancillary thereto. Sec. 2. ch. 448, U. S. Laws 1916. *Dail v. R. R.*, 116.

CLERKS OF COURT.

1. *Clerks of Court— Fees— Supreme Court— Docketing Transcript.*—The appellant's undertaking does not cover the fee of the clerk of the Supreme Court in docketing the case, and the clerk is in the exercise of his right in refusing to docket the transcript where he has demanded the prescribed fee in advance and its payment has been refused. Revisal, secs. 2804, 1250. *Dunn v. Clerk's Office*, 50.

2. *Clerks of Court—Probate Judge—Statutes, Directory—Deeds and Conveyances—Title.*—The law is directory that requires the probate judge of the county wherein the lands lie and the deed registered to pass upon the probate taken by the probate judge in another county, and his failure to have done so does not alone affect the title thus conveyed. *Heath v. Lane*, 119.

COLLATERAL ATTACK. See Appeal and Error, 25.

COLLECTIVE FACTS. See Evidence, 40.

COLOR OF TITLE. See Betterments, 1.

COMMERCE. See Carriers of Freight.

Commerce—Transportation—Carriers—Penalty—Statutes.—A penalty may not be recovered of the carrier of an interstate shipment for negligent delay in transportation, under our statute (Revisal, 2632.). *Bivens v. R. R.*, 415.

COMMISSION. See Witnesses, 1; Appeal and Error, 2.

COMMISSIONERS. See Road Districts, 5; Drainage Districts, 10.

COMPENSATION. See Wills, 11.

CONDEMNATION. See Drainage Districts, 7; Railroads, 4.

CONDITIONS. See Contracts, 42.

CONDITIONS PRECEDENT. See Sales, 3.

CONFEDERATE SOLDIERS. See Pensions, 1.

CONFIRMATION. See Contracts, 4.

CONFLICT. See Statutes, 8, 10.

CONGRESS. See Constitutional Law, 3.

CONSENT. See Reference, 1; Judgments, 12; Drainage Districts, 2; Husband and Wife, 7; Trusts and Trustees, 17; Appeal and Error, 42, 51.

CONSIDERATION. See Judgments, 8; Contracts, 23, 32, 34; Banks and Banking, 3; Master and Servant, 11.

CONSOLIDATION. See Actions, 6.

CONSTITUTIONAL AMENDMENTS. See Constitutional Law.

Constitutional Amendments — Time of its Effect — Road Districts — Taxation.—The recent constitutional amendments ratified at the election in November, 1916, did not take effect until after 10 January, 1917, and cannot affect a statute, passed before the latter date, creating a road district and providing for a tax levy and bond issue for road improvement and maintenance. *Woodall v. Highway Commissioners*, 378.

CONSTITUTION.

ART.

II, sec. 14. Road construction and improvements are necessary expenses within the meaning of this article. *Woodall v. Highway Commission*, 377.

VI, secs. 1 and 2. Where electors are qualified, the mere failure of registrars to administer oath does not invalidate bonds issued for road improvements. *Ibid.*

VII, sec. 7. A special school district falls within the restrictions of this article. *Williams v. Comrs.*, 554.

VII, sec. 7. Tax levy to supplement the school fund falls within meaning of this article, and voting for county and township tax on but one ballot is void. *Hill v. Lenoir County*, 572.

VII, sec. 7. A majority of the qualified voters is not necessary for road improvement bonds. *Ibid.*

X, sec. 6. Realty of wife, acquired before or after marriage, is wife's separate estate, in which the only right of husband is to withhold his written consent. *Kilpatrick v. Kilpatrick*, 182.

X, sec. 6. Written consent of husband necessary to wife's conveyance of her separate realty. *Stallings v. Walker*, 321.

CONSTITUTION—*Continued.*

ART.

X, sec. 6. Married women may devise separate realty as if she were a *feme sole*, and this provision, having taken effect from time of its adoption by the State, not when Congress approved it, will be read into the terms of a will, in absence of prohibitory terms. *Freeman v. Lide*, 434.

X, sec. 6. Purchase by husband of lands with wife's money, with title to them both, is not necessarily a gift by wife of her personalty: he is only tenant by the curtesy, upon birth alive of issue, etc., the land descending to wife's heirs at law. *Deese v. Deese*, 527.

CONSTITUTIONAL LAW. See Constitutional Amendments: Husband and Wife, 1, 7, 9; Road Districts, 1, 2, 3, 4, 5; Parent and Child, 2; Taxation, 7; Courts, 9; Criminal Law, 10.

1. *Constitutional Law—Married Women—Separate Property—Wills—Devise—Deeds and Conveyances—Statutes.*—Under the provisions of Art. X, sec. 6, of our Constitution, and as later declared by our statutes, a married woman may now devise and bequeath her separate real and personal property as if she were a *feme sole*, which does not apply to a conveyance of her realty by deed. *Freeman v. Lide*, 434.

2. *Constitutional Law—Trusts—Uses and Trusts—Statute of Uses—Married Women—Wills — Devise — Powers of Disposition.*—A devise of land to the husband in trust that he will "take, hold and receive the same for the sole and separate use of" his wife, her heirs and assigns; whether since the adoption of the Constitution of 1868, Art. X, sec. 6, as to her separate estate, equity would regard the naked legal title as being in the trustee, and unite it with the equitable title in her, or regard the trust as an active one, *Quære;* and *Held*, in the absence of any prohibitory terms in the instrument, the constitutional power given to the wife to devise her lands as if she were unmarried will be read into the instrument; and her devise, taking effect at her death, necessarily with the termination of the purpose of the trust, is valid and enforcible. *Ibid.*

3. *Constitutional Law—Constitution of 1868, When Effective—Adoption—Approval by Congress.*—Our Constitution of 1868, in this case, with relation to the separate property of a *feme covert*, Art. X, sec. 6, took effect upon its adoption by the State, and not from the later date when Congress approved it. *Ibid.*

4. *Constitutional Law — Taxation — Schools — Necessary Expense.*—The levying of a tax to supplement the school funds of a county or township is not for a necessary expense, and requires the submission of the question to the voters of the district. Constitution, Art. VII, sec. 7. *Hill v. Lenoir County*, 573.

5. *Constitutional Law— Taxation— Discrimination— Schools —Counties— Townships.*—A legislative act authorizing a township within a county to submit to its voters the question of imposing upon the township a tax to supplement its public school funds in the event the county should vote, as a county, against the proposition, the taxes to be levied and collected in the same manner and at the same time as other taxes of the county are levied and collected; and should the vote within the township be favorable, "the annual special local-tax levy, etc., may be

CONSTITUTIONAL LAW—*Continued.*

reduced by an amount not exceeding the special levy under the act," etc. *Semble*, the effect of the statute would be to impose a tax upon one section in favor of another, which is prohibited by our Constitution, and to allow one section to impose a tax upon another to which it is not itself subjected, which is also prohibited. *Ibid.*

CONTEMPT. See Perjury, 1.

CONTENTIONS. See Instructions, 9.

CONTINGENCIES. See Estates, 3.

CONTINGENT LIMITATIONS. See Wills, 1; Estates, 6.

CONTRACTS. See Conversion, 1; Statutes, 3; Mechanics' Liens, 5; Principal and Agent, 1, 2, 10; Railroads, 2; Actions, 3; Partnership, 4; Vendor and Purchaser, 1, 3, 4; Husband and Wife, 1; Judgments, 11, 12, 14; Negligence, 8; Insurance, 10, 12, 13, 14; Limitation of Actions, 1; Deeds and Conveyances, 4, 5; Guardian and Ward, 1; Carriers of Freight, 1; Landlord and Tenant, 1, 2; Instructions, 2, 5; Evidence, 27, 31; Drainage Districts, 10; Perjury, 1; Sales, 2; Parties, 1; Parent and Child, 5; Appeal and Error, 46; Insurance, Fire, 4, 5, 7.

1. *Contracts—Offer to Buy—Acceptance of Offer—Vendor and Purchaser.* An acceptance of an offer must be in accordance with its terms, without substantial change therefrom, either by word or act, for it to show the agreement of the minds of the contracting parties thereon and become a binding contract. *Wilkins v. Vass Cotton Mills*, 72.

2. *Same — Additional Offer — Rejection.*—An offer by telephone to buy 10,000 pounds of 20's and 24's cotton yarns of specified kind, according to specifications of an existing contract, with weekly shipments to commence thereafter, replied to by telegram, "For immediate acceptance can furnish your order at half-cent advance over other order cotton higher," which in turn was replied to, "Telegram, accept offer, make it twenty-five thousand if can, make sixteens and eighteens, wire immediately," and followed by telegrams to original offerer, "Cannot increase order, we do not make number below twenty": *Held*, the words of the second telegram, "accept offer," was a binding acceptance of the proposition to sell 10,000 pounds of the yarns specified at an advance of half of a cent, and not affected by the rejected proposition to increase the amount to 25,000 pounds upon the condition named. *Ibid.*

3. *Contracts — Offers to Buy — Acceptance — Telegrams — Punctuation.*— Where an offer to sell has been made and accepted by telegrams, and, though not punctuated, the messages are so worded that they were fully understood by the parties, the absence of punctuation therein is immaterial. *Ibid.*

4. *Contracts—Telegrams—Telephones—Confirmation.*—Where it is customary to follow offers to buy, and acceptances of such made by telephone and telegraph, with confirmatory letters, for the purpose only of making more certain the terms of the resulting contract, and an acceptance of such an offer has been unconditionally made in full accordance with its terms, the failure of the parties to send such letters will not alter the binding effect of the contract. *Ibid.*

CONTRACTS—*Continued.*

5. *Contracts — Offers to Buy — Acceptance — Telegrams —"Wire Immediately."*—Where an offer for the sale of cotton yarns has been made by telegram for immediate acceptance, and immediate reply of acceptance has been sent by telegraph, with a proposition to increase the order in yarns of certain other sizes, "wire immediately," which was rejected, the words "wire immediately" refer to the new and independent offer to buy, and does not affect the binding force of the accepted offer to sell. *Ibid.*

6. *Contracts—Lessor and Lessee—Municipal Corporations—Ordinances—Statutes—Sewers—Health.*—Where an ordinance of a town, in pursuance of its municipal powers, makes the use and maintenance of surface privies unlawful upon lots abutting upon a street wherein a sewer-pipe has been laid, and requires the owner of such lots to connect with the sewer by a certain date, providing a penalty for its violation, the courts will examine the ordinance to ascertain the intent of the municipal authorities in passing it; and the validity of a contract of lease of premises adjoining a street wherein the pipe had been laid is not affected by the fact that the owner thereof has failed to comply with the ordinance, there being nothing in the lease transaction immoral *per se*, or inhibition in the contract of lease against making the connections required. *Hines v. Norcott*, 123.

7. *Same—Suitable Premises—Trials—Questions for Jury.*—The owner of a lot in a town contracted to lease a part of a building to be erected by him thereon, providing among other things that the building should be "a suitable one," and after its completion the lessee entered upon the leased premises and occupied the same without objection. Thereafter an ordinance of the town required the owner of the building, under penalty, to connect with a street sewer, which he failed to do. The ordinance being interpreted as not affecting the contract, it is held that the lessee's right to annul the lease was properly made to depend upon the question of fact whether the building was a suitable one within the intent and meaning of the contract. *Ibid.*

8. *Contracts — Fraud — Evidence — Parol Evidence.*—The rule permitting parol evidence to contradict the terms of a written instrument attacked for fraud in its procurement has no application when there is no allegation or sufficient evidence of such fraud, and the effect of parol evidence is only to vary the terms of the agreement as expressed in the writing. *Bullock v. Machine Co.*, 161 N. C., 13; *Machine Co. v. Feezer*, 152 N. C., 516, cited and applied. *Murray v. Broadway*, 149.

9. *Contracts—Torts—Timber—Deeds and Conveyances—Evidence—Questions for Jury.*—Where the action is to recover damages of the defendant for cutting timber not conveyed in the plaintiff's deed, and there is evidence tending to show that such injury was wrongfully caused by the defendant's grantee, it is competent to show, as to the joint tort, that the defendant and its grantee were corporations chartered by the laws of the same State, had offices in the same building, with many stockholders and some officers common to both; that the defendant's president was the general manager of its grantee corporation; that the grantee corporation had cut the timber unlawfully for a considerable period, and in settlement, though made through a trust

CONTRACTS—*Continued.*

company, had to account to the defendant's officer, the amount to be determined by the number of all trees cut by a certain rule agreed upon, the amounts returned to the trustee including those for trees so unlawfully cut. *Williams v. Lumber Co.*, 174.

10. *Contracts — Independent Contractor — Dangerous Instrumentalities — Fires—Damages—Principal and Agent.*—A principal may not escape liability for damages caused by an independent contractor when the work, under the contract, contemplates the use of instrumentalities dangerous to the rights of others, in this case, damages to the land of the owner from fires negligently set out by an engine in cutting the timber therefrom. *Ibid.*

11. *Contracts, Written—Vendor and Purchaser—Fraud—Opinions—Mistake of Law.*—Where a seller of goods has induced a transaction by a false representation, upon which the purchaser has relied, and which formed a material inducement, without which the trade would not have been made, etc., the question as to whether such representation was a mistake of fact or of law, and therefore not a false representation, will not affect the purchaser's right to annul the contract as having been obtained by fraud. *Hunter v. Sherron*, 226.

12. *Contracts, Written—Fraud—Parol Evidence.*—Where a written instrument sued on is sought to be invalidated for fraud, illegality, or failure of consideration, parol evidence thereof is admissible, and not objectionable on the ground that it varies or contradicts the writing. *Ibid.*

13. *Same—Vendor and Purchaser—False Representations—Bills and Notes —Consideration.*—A seller of fertilizer represented to a purchaser, an illiterate man, that if he would sign a note with another purchaser it would permit both shipments to be made in the same car and obviate the necessity of his taking two notes, and that it would be the same to him if he "signed one note as if it were two": *Held*, the statement was of the fact that the purchaser would only have to pay for his own fertilizer; and as to the other fertilizer, there was a failure of consideration, and evidence thereof was competent. *Ibid.*

14. *Contracts, Written— Parol Agreements— Merger— Corporations— Subscriptions to Stock.*—All prior and contemporaneous verbal agreements to a written subscription to take shares of stock in a proposed corporation merge in the writing. *Plummer v. R. R.*, 280.

15. *Same—Contradiction—Statute of Frauds.*—A written subscription to take shares of stock in a proposed corporation by paying a certain amount in cash and the balance when called for by its board of directors cannot be varied by evidence of a parol agreement that the subscriber only obligated himself, in the event the full amount required for the enterprise had been raised, as such would contradict or vary the written instrument. *Ibid.*

16. *Contracts, Written — Deeds and Conveyances — Parol Agreements — Reformation.*—A written contract concerning lands may not be reformed for mistake of the parties by incorporating therein a prior agreement by parol, unless it is shown that the parol agreement was a part thereof and fraudulently or unintentionally omitted by the parties or their draftsman. *Taylor v. Edmunds*, 325.

CONTRACTS—*Continued.*

17. *Contracts— Restraint of Trade, Reasonable— Public Interests.*—Unless in violation of express and definite statutory provision, agreements in partial restraint of trade will be upheld when they are founded on valuable considerations and reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest. *Mar-Hof Co. v. Rosenbacker,* 330.

18. *Same.*—Transactions involving the sale and disposition of a business trade or profession between individuals with stipulations restrictive of competition on the part of the vendor do not, as a rule, tend to unduly harm the public and are ordinarily sustained to the extent required to afford reasonable protection to the vendee in the enjoyment of property or proprietary rights he has bought and paid for, and to enable a vendor to dispose of his property at its full and fair value. *Ibid.*

19. *Same—Statutes.*—The common-law doctrine in its application to stipulations in restraint of trade, given them effect in certain instances as reasonable and not against public interests, is applicable to the interpretation of statutes on the subject where their terms are sufficiently indefinite to permit of interpretation. *Ibid.*

20. *Same—Intent—Vendor and Purchaser.*—Our statute on the subject, preventing an agreement or understanding of the parties engaged in buying or selling anything of value, made "with the intent of preventing competition," by making the invalidity of the agreement depend upon the intent of the parties and not arbitrarily on the effect of the agreement, is sufficiently indefinite to permit of construction and disclose the legislative purpose to subject such agreements to the standard of their reasonableness, to be determined by the character of the transaction and the purpose of the parties, as disclosed in the contract and the facts and circumstances permissible and relevant to its correct interpretation. Laws of 1913, ch. 41; Greg. Supp., sec. 3028, sec. 5, subsec. f. *Ibid.*

21. *Same—Breach of Contract—Damages—Counterclaim.*—A contract made in good faith between a vendor and purchaser of a certain particular make or character of a manufactured product that restricts the former from selling articles of the same make or kind to other dealers within the town wherein the purchaser conducts his mercantile business, and which requires the expenditure of large sums of money and much time in advertising the goods and popularizing them on the local market, does not come within the intent and meaning of chapter 41, Laws of 1913; and in the vendor's action for the purchase price the seller may recover damages as a counterclaim for breach of the seller's contract in that respect. *Ibid.*

22. *Contracts—Consideration—Restraint of Trade—Division of Territory—Vendor and Purchaser—Cotton-Ginning Plants.*—Under a contract dividing a county into separate territory, within which each of the respective parties was not to interfere with the business of the other in operating cotton gins, buying cotton seed, etc., the plaintiff sold the defendant a cotton-ginning plant, the latter agreeing to remove the plant and not to again operate one there, and upon the violation by the defendant of this contract the plaintiff seeks an injunction: *Held,* the intent of the agreement was a division of territory, with the object

to eliminate competition therein, making inapplicable the principles upon which a partial restraint of trade, when reasonable, may be enforced in the interest of the vendee; and were it otherwise, the public interest in so large a territory in having cotton conveniently and inexpensively ginned was unreasonably interfered with; and the injunction, being against the principles of the common law and our statutes applicable, was properly dissolved. Laws 1913, ch. 41. *Shute v. Shute*, 462.

23. *Contracts—Repudiation—Consideration Retained—Estoppel in Pais—Vendor and Purchaser.*—A party to a contract may not retain its benefits and repudiate its obligations and burdens, or retain advantages in the course of a business deal or negotiations, when he has renounced and refused to abide by its terms; the principle is based upon the doctrine of estoppel *in pais*, which, in its last analysis, rests upon principles of fraud. In such case it is not always necessary that the fraudulent purpose be present at the inception of the transaction, but at times may operate and become effective by reason of an unconscionable refusal to return the consideration or make such restitution as equity and good conscience require. *Auto Co. v. Rudd*, 497.

24. *Contracts, Immoral—Public Policy—In Pari Delicto—Physicians—Evidence—Courts.*—In an action against a physician to recover money that his patient has paid him under a contract to give him a certain per cent of the recovery of damages for a personal injury, in consideration of favorable expert testimony to be therein given, and in the present action it appears that the charges of the physician had been knowingly and designedly made, and that the drugs he had administered had impaired the mind of his patient until relieved by the attendance of another physician: *Held*, though a recovery is not permitted when based on immoral contracts, the courts, in the fair and impartial administration of justice, and with proper regard for their own purity and integrity, will cause restitution to be made. *Davis v. Smoot*, 538.

25. *Contracts—Sales—Trusts and Trustees—Resulting Trusts—Vendor and Purchaser—Deeds and Conveyances.*—An agreement between the plaintiff and the purchaser at a commissioner's sale of land that the latter assign his bid to the former and have the deed made to him upon payment of the purchase price, rests upon the express contract of the parties, and does not involve the principles relating to resulting trusts, as where the purchaser uses the money of another and takes the title, by deed, to himself. *Rush v. McPherson*, 562.

26. *Contracts—Parol Agreements—Statute of Frauds—Equity—Deeds and Conveyances—Cloud on Title—Sales—Assignment of Bid.*—Where it has been established that the defendant, a purchaser at a commissioner's sale of land, was under a parol agreement with the plaintiff's deceased ancestor to assign his bid to him and have the deed made to him direct, upon his paying the purchase price, and that this had been done and the deed thus made had been lost; that the plaintiff's ancestor and the plaintiff had continuously enjoyed peaceful adverse possession of the land for many years, and that fourteen years after the completion of the transaction the defendant had acquired a deed from the commissioner to himself: *Held*, a suit in equity will lie to have

CONTRACTS—*Continued.*

the defendant declared a trustee for the plaintiff's benefit and to remove the defendant's deed as a cloud upon the plaintiff's title. Under evidence in this case, a decree providing for the reimbursement of the defendant is held to be sufficient. *Ibid.*

27. *Contracts— Statute of Limitations— Statutes— Writing— Parol Agreements—Equity.*—A promise not to plead the statute of limitations, when founded upon a sufficient consideration, is not required by our statute to be in writing, Revisal, sec. 371, and the parol promise is upheld upon the equitable principle that to permit the debtor to avail himself of its benefits before the statute had run and then deny his obligation would be against good conscience and tend to encourage fraud. *Oliver v. Fidelity Co.*, 598.

28. *Contracts— Writing— Ambiguity— Evidence — Conditions — Parol Evidence.*—The surrounding circumstances of the parties, when relevant, and parol evidence thereof, is competent to show the agreement of the parties to the written contract, which the law does not require to be in writing, when it is expressed in ambiguous language or susceptible of more than one interpretation; and this principle applies to a contract made with an agent relative to his having also assumed a personal liability thereunder. *Caldwell County v. George*, 603.

29. *Contracts— Breach —"Liquidated Damages"— Interpretation.*—While a stipulation for "liquidated damages" for the breach of a contract may be enforcible in the amount stated, in proper instances, the mere use of this expression by the parties to the contract does not necessarily control, for the true intent and meaning of the contract must be determined by a proper consideration of the instrument as a whole, the situation of the parties, the subject-matter of the contract and of all the circumstances surrounding its execution. *Horn v. Poindexter*, 620.

30. *Same—Penalty.*—Where the nature and terms of a contract and the conditions and circumstances relevant to its interpretation afford sufficient data for a definite and satisfactory estimate of the damages which may arise from its breach, the fixing of them in an amount stated in the contract, designating them as "liquidated damages," does not of itself control the interpretation, the tendency of the courts being to regard these stipulations as in the nature of a penalty, and to uphold the fundamental principle of just compensation wherever there is such a marked disproportion between the amounts fixed upon and the damages likely to arise as to render them arbitrarily unreasonable or oppressive or likely to become so in the course of adjustment, without reference to the actual loss sustained. *Ibid.*

31. *Same — Pleadings — Judgments — Default and Inquiry.*—In an action upon a bond to secure the defendant's performance of the remaining portion of the plaintiff's contract, covering a term of years, for carrying government mail, as sublessee, with the approval of the government, the contract sued on stipulated a certain amount as "liquidated damages," to be recovered upon its breach by the defendant: *Held*, by a proper interpretation of the contract, the stated amount was in the nature of a penalty, within which a recovery for actual damages may be had upon its breach, the same being of a nature to be readily ascertained or determined upon; and a final judgment by default for the

CONTRACTS—*Continued.*

want of an answer was improperly entered, the proper one being by default and inquiry. *Ibid.*

32. *Contracts— Unilateral Contracts — Options — Seals — Vendor and Purchaser— Consideration— Timber— Specific Performance.*—Payment of the nominal consideration recited in a contract, under seal, to convey the timber upon lands described, is not necessary to have been made in order that the one taking the option may enforce specific performance of its terms, when he has exercised the right within the terms of the agreement, tendered the agreed purchase price within the stated period, and has at all times been ready, able and willing to comply with his obligations thereunder; and the proposed seller may not avoid his own obligations by notifying the proposed purchaser beforehand, or at any time within the life of the option, that the same is withdrawn by him, and successfully set up a failure of consideration as a defense to the suit for specific performance. *Thomason v. Bescher*, 622.

33. *Contracts— Unilateral Contracts— Seals— Options — Timber — Specific Performance.*—Whether the seal to a written instrument granting an option on, or unilateral contract to convey, the timber upon lands, conclusively imports a consideration, or the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instructions are considered binding agreements by the common-law courts, apart from the question of whether the nominal consideration therein recited has in fact been paid, and are likewise enforcible in the courts of this State, there being no statute on the subject and nothing unconscionable or inequitable in the contract sought to be enforced. *Ibid.*

34. *Contracts — Unilateral Contracts— Options— Consideration — Purchase Price.*—Where the proposed purchaser, under a written unilateral contract to convey land, under seal, has availed himself of his option, and has performed as far as possible the conditions required of him, and sues for specific performance upon the breach of the contract by the proposed vendor, the consideration is not restricted to the seal or the nominal amount usually present in bargains of this character, but extends to and includes the purchase price agreed upon. *Ibid.*

35. *Contracts—Options—Unilateral Contracts—Timber—Deeds and Conveyances— Vendor's Purchaser— Parties— Specific Performance.*—Where the proposed vendor in a contract to convey lands has thereafter sold a part of the lands to another, and the proposed purchaser has accepted the option, made tender of the purchase price, and has in all other respects complied with its terms, and brings suit against the proposed seller and his vendor for specific performance, standing always ready, able and willing to perform his obligations under the contract, and defendants deny all liability thereunder: *Held*, the plaintiff is entitled to enforce specific performance of the entire contract against both the proposed seller and his vendor. *Ward v. Albertson*, 165 N. C., 218, cited and applied. *Ibid.*

36. *Contracts, Written—Lands—Parol Evidence—Contradiction.*—A written contract for the sale of a known, designated and described tract of land, "containing about" a certain number of acres, at a fixed price, is not for the sale of the land by the acre, and excludes the admission of

CONTRACTS—*Continued.*

parol evidence to that effect, in the absence of fraud. *Galloway v. Goolsby*, 636.

37. *Contracts, Written — Evidence — Fraud— Misrepresentations — Mutual Mistake—Pleadings.*—Where parol evidence is sought to vary the terms of a written contract for the sale of lands, as tending to show that the designated tract was sold by the acre, allegation with evidence that the vendor, or his agent, had represented that the land contained a larger acreage than that specified "before, at and after" the transaction, is not sufficient upon the question of fraud or mutual mistake. *Ibid.*

38. *Contracts, Written—Pleadings—Fraud.*—To set aside a written instrument for the sale of lands for fraud, it is necessary for the complaint to allege an intent to defraud and deceive, with the facts necessary to constitute them, and that advantage had been taken thereof. *Ibid.*

39. *Contracts—Tort— Election— Waiver— Actions.*—Upon the discovery of fraud in the procurement of a written contract, the plaintiff must elect, within a reasonable time, depending upon the existing circumstances, either to sue upon the tort and recover his damages for any deceit, or claim under the terms of the contract; and where he has elected to sue for damages for breach of contract, and not in repudiation thereof or for its reformation, he thereby waives his right of action to invalidate it by reason of the tort. *Arndt v. Ins. Co.*, 653.

40. *Contracts—Breach—Notice—Buildings.*—A failure of the owner to give the notice required by a building contract before taking it from his contractor is a breach of the contract; and where the evidence is conflicting, and the jury have found, under a correct charge, that such notice had been given, the verdict upon that phase of the controversy will not be disturbed. *Wilkerson v. Pass*, 698.

41. *Contracts— Breach— Ability to Perform— Evidence— Rebuttal— Cross-Examination.*—Where the plaintiff sues for damages for the defendant contractor's breach of a building contract, alleging that he had at all times been ready, with material, workmen, etc., to perform his part, it is competent on his cross-examination for defendant to examine him in relation to a judgment taken against him on a note as tending to disprove his evidence as to his financial condition or ability to complete the contract sued on. *Ibid.*

42. *Contracts—Instructions—Buildings—Payments—Conditions—Requested Instructions.*—Where the owner, under the terms of a building contract, is obligated to pay his contractor 80 per cent of the contract price during the progress of construction, etc., "upon itemized estimates made by the contractor and approved by the architects or superintendents," a request for instruction is properly refused which makes the question of the owner's breach of the contract in this respect to depend upon whether the payments had been made, without reference to the prescribed conditions under which they were to have been done. *Ibid.*

CONTRADICTION. See Instructions, 1; Evidence, 51.

CONTRIBUTORY NEGLIGENCE. See Railroads, 1, 16; Negligence, 11; Master and Servant, 4; Criminal Law, 6.

CONVERSION.

Conversion—Lands—Trees—Counties—Roads and Highways—Contracts—Torts.—Where it is admitted that the owner of lands had given by parol to the county a right of way over them for a roadway, which was being constructed by the defendant under contract with the county, and the statute of frauds is not pleaded or relied upon, the gift of the land carries with it the trees, etc., thereon; and the owner, the plaintiff in the action, may not recover of the defendant for the tops and laps of these severed trees that had been used by the defendant's employees as firewood during the construction of the road, as for wrongful conversion, or otherwise. *Cotton v. Johnstone*, 10.

COPIES. See Wills, 7.

CORPORATION COMMISSION. See Principal and Agent, 2; Contracts, 14; Trusts and Trustees, 12; Carriers of Goods, 2.

CORPORATIONS. See Principal and Agent, 2; Contracts, 14; Trusts and Trustees, 12.

1. *Corporations—Mortgages—Torts—Preferences—Statutes.*—To secure a preference over a mortgage given by a corporation for damages arising in tort, etc., Revisal, sec. 1130, the action should be commenced within sixty days after the registration of the mortgage. *Joyner v. Reflector Co.*, 275.

2. *Same—Liens—Judgments—Execution—Receivers—Distribution.*—Revisal, sec. 1131, confers no lien upon the property of a corporation in favor of one injured by its tort, but eliminates the corporate mortgage in favor of a judgment therefor, duly commenced, which the judgment debtor may collect by execution, except when a receiver has been previously appointed, and then he is entitled to his pro rata distribution of the funds. *Ibid.*

3. *Corporations—Torts—Mortgages—Purchase Price—Statutes.*—A mortgage of a corporation to secure purchase money has priority over a judgment against it arising in tort. *Walker v. L. Co.*, 174 N. C., 60, cited and applied. *Ibid.*

4. *Corporations—Subscriptions to Stock—Abandonment—Equity.*—The mere fact, alone, that a proposed corporate enterprise has been suspended affords a subscriber to the capital stock no excuse for not paying his subscription to its shares upon call of the directors, according to his agreement, and gives the court no equitable jurisdiction to interfere and prevent further calls upon the stockholders, unless it be made to appear that they have equally contributed to the common object and the rights of others are not impaired. *Improvement Co. v. Andrews*, 281.

5. *Corporations—By-Laws—Officers—Secret Limitations—Principal and Agent—Bills and Notes—Ultra Vires.*—The plea of a corporation, in defense to an action upon its note, made in its behalf by its president, that it was not countersigned by its secretary, as required by its by-laws, and therefore the act was *ultra vires*, is untenable, when it appears that the corporation was owned by these officials and their wives, who had adopted no written by-laws or kept a record of their proceedings as a corporation; for the restriction relied on would only amount to a secret limitation upon the authority usually vested in the chief officer of corporations. *Phillips v. Land Co.*, 514.

CORRECTION. See Judgments, 19.

CORRESPONDENCE. See Principal and Agent, 12.

CORROBORATION. See Evidence, 3.

COSTS. See Appeal and Error, 17, 24, 51; Courts, 4; Vendor and Purchaser, 5.

1. *Costs—Partial Recovery—Dividing Line—Lands.*—Where the plaintiff has recovered a part of the lands claimed by him, in an action depending upon the establishment of the true line between his land and those of the defendant adjoining them, the latter is properly taxable with the costs. *Swain v. Clemmons*, 175 N. C., 240, cited and applied. *Parker v. Parker*, 198.

2. *Costs—Statutes—Recovery.*—Where the controversy is made to depend upon the right of the mechanic to repossess an automobile that he has repaired, in order that he may enforce his lien thereon, and the jury has found in the plaintiff's favor upon determinative issues, but in defendant's favor upon an issue of fraud, the question of taxing the cost does not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, he is entitled to recover the costs, under our statute, Revisal, sec. 1264 (2). *Auto Co. v. Rudd*, 497.

COUNTERCLAIM. See Vendor and Purchaser, 1; Contracts, 21; Pleadings, 7; Appeal and Error, 50.

COUNTIES. See Conversion, 1; Pensions, 1; Taxation, 1; Elections, 13; Constitutional Law, 5.

COUNTY BOARDS. See Elections, 2.

COURTS. See Judgments, 1, 10; Elections, 1; Justices of the Peace, 1; Actions, 4, 6; Wills, 8; Habeas Corpus, 5; Trusts and Trustees, 12; Guardian and Ward, 1; Evidence, 12; Appeal and Error, 15, 31; Contracts, 24; Homicide, 10.

1. *Courts—Discretion—Motions—Appeal and Error—Objections and Exceptions.*—Objection that a verdict is against the greater weight of the evidence should be made upon motion, addressed to the sound discretion of the trial judge to set it aside. *Southerland v. Brown*, 187.

2. *Courts—Discretion—Recalling Witnesses—Appeal and Error.*—Permitting a witness to be recalled and testify, though contradictory of his first evidence, is in the discretion of the trial judge, and not reviewable on appeal. *Hunter v. Sherron*, 226.

3. *Courts—Justices of the Peace—Appeal—Superior Courts—Jurisdiction.* On an appeal from an order of the clerk of the Superior Court allowing compensation to attorneys employed by the next friend of an infant in his successful action against the guardian for wrongful conversion of the property to his own use, the Superior Court acquires jurisdiction, and may hear and determine the matter *de novo* as if originally begun there, though the jurisdiction may have been erroneously assumed by the clerk. *In re Stone*, 336.

4. *Courts—Jurisdiction—Custody of Funds—Guardian and Ward—Attorneys and Client—Attorneys' Fees—Costs.*—Where the judgment in an action by a ward against his guardian has been rendered in the Supe-

COURTS—*Continued.*

rior Court in favor of the ward, and the court has taxed the entire estate with the cost, including a fee to the attorneys employed by the next friend under authority of court, but reserving the amount for further determination, upon motion made by the attorneys at a subsequent term of the court, an order was promptly entered fixing the amount of such compensation, the court having retained not only the cause, but the control of the funds. *Ibid.*

5. *Courts— Discretion— Verdict— Appeal and Error.*—The refusal of the trial judge to set aside a verdict as contrary to the weight of the evidence is within his just discretion, and not appealable, in the absence of its abuse. *Moore v. Milling Co.*, 408.

6. *Courts—Discretion—Evidence—Appeal and Error.*—It is within the discretion of the trial judge to permit plaintiff's witness to testify to new matter after the defendant's evidence is closed, and not reviewable on appeal. *Woodall v. Highway Commission*, 379.

7. *Courts— Expression of Opinion— Statutes— Electricity.*—Where an excessive voltage of electricity on the defendant's wire is in question on the trial for the negligent killing of plaintiff's intestate, and an expert witness has been asked the amount of the voltage that caused the death, a remark of the judge that the witness could state the voltage that would produce the amount actually upon the wire at the time, is not objectionable as an expression of opinion prohibited by the statute. *Smith v. Comrs.*, 466.

8. *Courts—Supreme Court—Newly Discovered Evidence—Motions Denied —Opinions.*—Motions made for a new trial in the Supreme Court upon insufficient newly discovered evidence will be denied without giving an opinion. *Tillotson v. Currin*, 480.

9. *Courts—Constitutional Law—Statutes—Taxation—Schools.*—An act of the Legislature will not be declared unconstitutional by the courts when its validity may be upheld by a reasonable interpretation of its terms; and chapter 71, Laws 1911, authorizing an election to be held by the county of Lenoir to determine upon a tax to supplement the school funds, and to apply to townships voting in its favor should the proposition be rejected by the county at large, is construed to require the propositions to be submitted upon separate ballots to ascertain the expression of the voters as to whether they desired it for the township if the county should vote against it, or *vice versa*. *Hill v. Lenoir County*, 573.

COURT'S DISCRETION. See New Trials, 1, 3; Evidence, 18.

COVENANT. See Deeds and Conveyances, 7.

CREDITORS. See Limitation of Actions, 7; Trusts and Trustees, 14, 17.

CRIMINAL INSANE. See Criminal Law, 9, 10, 14.

CRIMINAL LAW. See Malicious Prosecution, 1, 2; Incest, 1; Perjury, 1; Homicide, 1; Appeal and Error, 55; Evidence, 42.

1. *Criminal Law— Restrictive Evidence— Character— Rebuttal.*—A prisoner charged with a crime, and who has testified in his own behalf, may not put on evidence in rebuttal of that of the State tending to

CRIMINAL LAW—*Continued.*

show his bad character, and have it confined to his credibility as a witness. *S. v. Atwood*, 704.

2. *Criminal Law—Witnesses—Defendant—Evidence—Character—Substantive Evidence.*—Where the defendant in a criminal action has become a witness in his own behalf, he is subject to cross-examination and impeachment, involving his credibility; and where testimony as to his general character has been introduced upon each side, his evidence may be considered as substantive upon the question of guilt or innocence. *S. v. Atwood, ante*, cited and applied. *S. v. Wentz*, 746.

3. *Criminal Law—Larceny—"Recent Possession"—Presumptions—Burden of Proof—Instructions—Trials.*—Where there is sufficient evidence of "recent possession" of stolen property, the burden still rests upon the State to prove the defendant guilty, throughout the trial, beyond a reasonable doubt; and a charge that the defendant should be acquitted if his explanation raised a reasonable doubt nullifies the duty of the State to exclude such doubt from the minds of the jury and deprives the defendant of his right to have them pass upon the weight and credibility of the other evidence in the case. *S. v. Harrington*, 716.

4. *Criminal Law — Evidence — Bloodhounds.*—The action of bloodhounds may be received in evidence when it is shown that they have been accustomed to pursue the human track, have been found by experience reliable in such cases, and that in the particular instance they were put on the trail of the accused and pursued and followed it under such circumstances and in such a way as to afford substantial assurance or permit a reasonable inference of identification. *S. v. McIver*, 718.

5. *Same—Footprints—Identification.*—Evidence that trained and experienced bloodhounds had been put on the trail of the accused at the place he had been at work during the day; that they followed his tracks down the road a mile, passing other dwellings to his own, where he was found; that he protested his innocence without accusation; that the energy of the hounds then became passive or content, one of them placing its paw on overalls he admitted he had been wearing, and that there were particular marks on the bottom of the shoes of the accused which corresponded with the tracks which had been followed, both as to the markings and size and shape, is sufficient to be submitted to the jury upon the question of his guilt. *Ibid.*

6. *Criminal Law — Involuntary Manslaughter — Negligence — Evidence — Contributory Negligence.*—Contributory negligence is not a defense to a charge of involuntary manslaughter, and may only be considered in its relevancy to the question of the defendant's negligence, which must be in a greater degree than that required to sustain a civil action for damages. *S. v. Tankersly*, 172 N. C., 959, cited and applied. *S. v. Oakley*, 755.

7. *Criminal Law—Evidence—Nonsuit—Trials.*—While the evidence upon a trial for involuntary manslaughter must be considered in the light most favorable to the State, upon defendant's motion as of nonsuit, it does not require the inference of the worse intent of which the evidence is possibly capable. *Ibid.*

8. *Same—Automobiles—Speed Limits.*—Upon a trial for involuntary manslaughter, the evidence for both the State and the defendant tended to

CRIMINAL LAW—*Continued.*

show that the defendant was traveling along a country road, driving an automobile at a lawful speed, and ran upon and killed the deceased while endeavoring to pass the forward machine, which had stopped at the home of the deceased; that the deceased was a lad, and, becoming confused, stepped from the space between the two machines, where he could have safely remained; that the deceased and his competent driver knew that the defendant was following them, and with this knowledge the deceased alighted in this dangerous position; that the prisoner knew the deceased was in the forward machine, driven by a careful and competent man, and also where he lived: *Held*, this evidence was insufficient to be submitted to the jury, and defendant's motion as of nonsuit thereon should have been sustained. *Ibid.*

9. *Criminal Law— Criminal Insane— Offense Specified— General Description — Insanity — Acquittal — Judicial Investigation.*—Our statutes establishing a department for the criminal insane in the penitentiary, and prescribing the method by which the trial judge may detain the prisoner found not guilty of a criminal offense by the jury on the ground of insanity or want of mental capacity, specifies a high degree of crime, such as murder, rape, and the like, indicating a class of criminals who may be dangerous to the public or individuals, if left at ward, and by the addition thereto of the words "or other crimes" did not include within their intent and meaning the offense of resisting an officer when arrested, especially, as in this case, the resistance was only by words, in the nature of a threat that the officer could not take him alive. Revisal, secs. 4612-4622, inclusive. *Ibid.*

10. *Criminal Law—Insanity—Criminal Insane—Acquittal—Judicial Investigation—Constitutional Law.*—Revisal, secs. 4612-4622, permitting the trial judge to make investigation for the purpose of deciding upon committing the prisoner, relieved by the verdict of the jury from sentence for a criminal offense, on the ground of insanity or mental incapacity, to the department in the penitentiary for the criminal insane, is within the Legislature's constitutional authority, but, being a restraint of his liberty within the constitutional guarantee for his protection, should be strictly construed in his favor. *Ibid.*

11. *Criminal Law—Verdict—Fraud—Jeopardy—Judgments.*—The only exception recognized in the courts of this State to the rule that the trial judge should receive and act upon the verdict of a jury in a criminal action, as the jury renders it, is that for fraud in the trial, or procuring of the verdict on the part of the defendant or those acting for him, and to the extent that makes it manifest that, in fact and in truth, there has been no real trial and the defendant was not in jeopardy by reason of it. *Ibid.*

12. *Criminal Law—Verdict—Judgment.*—Where the jury, properly drawn and impaneled, have rendered a verdict that the defendant is not guilty of the crime for which he was tried, or which, by fair intendment, has that significance, it should be received by the court and recorded as rendered, and as a rule it must be acted upon according to its true intent and meaning. *S. v. Craig*, 740.

13. *Same—Alteration—Appeal and Error.*—The verdict of the jury in the defendant's favor, in a criminal action, may not ordinarily be questioned on appeal, except for errors of law duly assigned, or set aside

CRIMINAL LAW—*Continued.*

or materially altered by the trial judge, to the defendant's prejudice, or by the jury itself, after it has been finally received and recorded. *Ibid.*

14. *Criminal Law—Resisting Arrest—Insanity—Acquittal—Discharge—Judicial Investigation—Criminal Insane—Statutes.*—Where the offense charged is resisting arrest and the jury has found that the prisoner "did not have mental capacity to commit it," he should be discharged, and the trial judge is without authority, under our statutes, to detain the prisoner while investigating whether he should be committed to the department in the penitentiary for the criminal insane. Revisal, secs. 4612-4622. *Ibid.*

CROSSINGS. See Railroads, 1, 2.

CUSTODY. See Habeas Corpus, 3.

CUSTODY OF FUNDS. See Courts, 4.

DAMAGES. See Malicious Prosecution, 2; Contracts, 10, 21, 29; Principal and Agent, 2; Railroads, 10; Carriers of Freight, 1; Vendor and Purchaser, 3; Drainage Districts, 10; Master and Servant, 11.

1. *Damages—Subsequent Injury—Waters—Railroads—Judgments—Estoppel.*—Where damages—past, present, and prospective—have been recovered by a plaintiff of a defendant railroad company for negligently diverting surface water and ponding it upon his lands, an easement is acquired by the defendant to continue the particular injury for which it has paid, and the plaintiff may not thereafter recover, in a separate action, for the same cause; and where he has alleged an additional and subsequent negligent act in his second action, and the issue as to this has been answered against him, he is concluded by the farmer judgment. *Cartwright v. R. R.*, 39.

2. *Damages—Instructions—Railroads—Federal Employers' Liability Act—Contributory Negligence.*—Where the judge has correctly charged the jury, in the action of an employee of a railroad company to recover damages under the Federal Employers' Liability Act, as to the proportionate reduction of damages in case of contributory negligence, his use of the words "full measure of damages," in this connection, to express the rule of adjustment in case there was no negligent default on plaintiff's part, is not error or prejudicial to the defendant. *Jones v. R. R.*, 261.

3. *Damages — Negligence — Personal Injury — Earning Capacity.*—Where the plaintiff sues to recover damages for a personal injury alleged to have been negligently inflicted on him by the defendant, his employer, his earning capacity before and after the injury is competent on the issue of damages. *Beaver v. Fetter*, 334.

DANGEROUS INSTRUMENTALITIES. See Contracts, 10.

DEADLY WEAPONS. See Homicide, 6, 9, 10.

DEATH SENTENCE. See Evidence, 39.

DECEASED PERSONS. See Evidence, 1, 8, 36; Wills, 6.

DECLARATIONS. See Trusts, 1; Principal and Agent, 7, 13, 14, 17; Limitation of Actions, 3; Husband and Wife, 13.

DEDICATION. See Municipal Corporations, 1; Deeds and Conveyances, 1.

DEEDS AND CONVEYANCES. See Municipal Corporations, 1; Register of Deeds, 1; Easements, 1; Evidence, 1, 4, 20, 37; Wills, 1; Estates, 3, 6, 11; Clerks of Court, 2; Judgments, 8; Contracts, 9, 16, 25, 26, 35; Reformation of Instruments, 1; Actions, 6; Drainage Districts, 1, 6; Railroads, 4; Trusts and Trustees, 12, 14, 16, 17; Husband and Wife, 7, 9, 10, 11, 12, 13, 14; Tenants in Common, 2; Limitation of Actions, 1, 2; Estates, 7; Constitutional Law, 1; Taxation, 1, 2, 3, 5; Insurance, Fire, 3.

1. *Deeds and Conveyances — Boundaries — Description — Interpretation — Reference to Maps — Municipal Corporations — Cities and Towns — Streets — Offer of Dedication.*—Where the owner of lands within the corporate limits of a town has caused the same to be platted into streets and lots, and the map thereof duly registered, and in conveying a part thereof includes one of the streets within the boundaries given, and states that the description is according to the recorded plat, giving book and page in the register of deeds' office, the effect of the reference to the plat is to incorporate it in the deed as a part of the description of the land conveyed; and, construing the instrument as a whole, it conveys all the land, including the street, subject to the easement therein for the public use, and does not affect the previous offer of dedication. *Elizabeth City v. Commander*, 26.

2. *Deeds and Conveyances — Cancellation of Instruments — Fraud — Evidence — Tax Deeds.*—Evidence tending to show that the defendant bought plaintiff's land at a tax sale, for the amount of taxes due, while the latter was confined at home with sickness, and before the time for redemption had passed, received from him a payment thereon, with assurances that he would protect the plaintiff's interest, and, with continued assurances, received several payments upon the taxes due, until he had greatly overpaid himself; that he had obtained the tax deed, and imposed upon the defendant by giving him, an illiterate man, receipts as for rent, are reasonable and permissible inferences of the defendant's design to wrongfully secure the land at a nominal sum, and sufficient to be submitted to the jury in a suit to cancel the tax deed for fraud in its procurement. *Sutton v. Dunn*, 202.

3. *Deeds and Conveyances — Estoppel — Heirs at Law — Descent.*—The acceptance of an heir at law from the others of a deed to all of their "right, title, and interest" in the lands does not estop him from claiming such interest as may have descended to himself as an heir at law. *Hill v. Hill*, 194.

4. *Deeds and Conveyances — Contracts — Fraud or Mistake — Evidence — Partnership — Principal and Agent.*—Where there is evidence tending to show that two partners, acting as the sales agent for lands, were to receive the balance of the land as compensation after a part thereof had been sold to other parties in various parcels; that they knowingly and intentionally procured the owner to make a deed to them of a strip of adjoining land not included in the contract, under circumstances tending to show that he signed the deed, among several others submitted at the time, relying upon the representation of one of the partners that it would close the deal, and without knowing at the

DEEDS AND CONVEYANCES—*Continued.*

time that the land conveyed was not included in the agency contract: *Held*, in the owner's suit to set aside the deed for fraud and mistake against one of the partners, that admissions in the evidence and pleadings of the other partner that he had reconveyed his part of the *locus in quo* to the owner without consideration are competent, and upon all of the evidence the case was properly submitted to the jury. *Taylor v. Edmunds*, 325.

5. *Deeds and Conveyances—Contracts—Fraud or Mistake—Evidence.*—Upon evidence tending to show that the plaintiff was induced by the misrepresentations of his selling agent of lands, knowingly and intentionally made, to execute to the latter a deed to lands for compensation for his services not covered by the selling contract; that the agency covered many like transactions and the deed in question was sandwiched between other deeds handed the owner by the agent at the same time, with the remark that they completed the contract; that the owner signed them all without knowledge that he had conveyed land not therein embraced: *Held*, as between the immediate parties, evidence of fraud in the factum, there being no consideration; and notwithstanding the owner was an educated man and capable of informing himself at the time, it was sufficient to take the case to the jury upon the issue of fraud and mistake, in the owner's suit to set the deed aside. *Ibid.*

6. *Deeds and Conveyances—Equity—Mutual Mistake—Surveyor—Error—Judgments — Estoppel — Evidence — Nonsuit — Questions for Jury—Trials.*—Where the plaintiff sues to recover the balance of a certain agreed price for the surplus of his acreage in an exchange of lands according to the contract made, and there is evidence tending to show that the deeds given by the parties were induced by their mutual mistake, caused by the error of the surveyor in his calculations, the plaintiff's deed will not estop him from recovering under the contract entered upon. The evidence in this case is held sufficient to take the case to the jury. *Griffin v. Barrett*, 473.

7. *Deeds and Conveyances—Lands—Covenant—Actions—Ouster.*—To sustain an action for breach of covenant of warranty in a deed to lands it is necessary to allege and show an ouster or eviction by title paramount to that acquired under the deed. *Wilson v. Vreeland*, 502.

8. *Deeds and Conveyances—Alleys—Appurtenances—Adjoining Lands—Adverse Possession — Evidence — Questions for Jury — Limitation of Actions.*—The owner of land within the limits of a city conveyed a part thereof to P. and G., along which was an alley, and afterwards another part to the county for a courthouse square, leaving the alleyway to connect with part of the land he had then retained, with provision in the deed to P. and G. leaving one-half, or 4 feet, of this alley adjoining the P. and G. land "in the seizure of" the grantor, with covenant that it should be continuously left open as a passway for himself and the said P. and G., and which should not be obstructed "by him or any other person." Thereafter, the county acquired all of these lands, and among other things done on the alley, it enclosed the alley with a fence, planted trees, grass, rose bushes, etc., thereon, and the county and its grantee, the defendant in the action, held the alley as part of the courthouse square for a period of fifty years: *Held*, sufficient evidence of adverse possession to ripen the defendant's title

DEEDS AND CONVEYANCES—*Continued.*

in the alleyway; and, further, the intent of the covenant in the deed, under which the plaintiff claims with respect to the alleyway, was to reserve it for the benefit of P. and G. and of himself and his heirs, and passed under the *habendum* as an appurtenance to the adjoining land since acquired by the defendant's grantor. *Patrick v. Ins. Co.*, 660.

9. *Deeds and Conveyances— Alleys— Appurtenances — Evidence — Extraneous Circumstances.*—Observing the strict requirement that in construing conveyances of land the intention of the parties is first to be ascertained from the language employed in the written instruments, regarded as a whole, the courts may regard the surrounding circumstances, in appropriate instances, in ascertaining their intent, and adopt the interpretation which conforms more to the presumed meaning; and where it clearly appears that a grantor of lands has covenanted that an alleyway be kept open for the convenience of his grantee, and of himself and his heirs, in regard to the adjoining lands, and also to afford an outlet to a part of his lands lying at the inner end of the alleyway, and that he has subsequently sold all the remainder of the land adjoining, the court may view the whole transaction and its attendant circumstances to ascertain the intent of the grantor as to the alley; and where the purchaser from him, and those claiming in succession to him, have acquired the whole of the original tract and used it adversely and notoriously, under a claim of right, for more than twenty years, without objection from any one, it is sufficient to vest the title in the defendant, the last purchaser. *Ibid.*

10. *Deeds and Conveyances— Alleys— Title— Merger.*—Where an alleyway has been reserved in a deed as appurtenant to their use, and the grantee has acquired the remainder of the lands, in fee, the easement, a subordinate and inferior derivative right, is merged in the fee-simple title. *Ibid.*

DEEDS IN TRUST. See Trusts and Trustees, 9.

DEFAULT AND INQUIRY. See Contracts, 31.

DEFECTIVE ENGINES. See Negligence, 2.

DELAY IN PRESENTMENT. See Principal and Agent, 11.

DELAYS. See Bonds, 1.

DELIVERY. See Vendor and Purchaser, 4.

DEMURRER. See Railroads, 9; Evidence, 11; Slander, 1.

DENIAL OF LIABILITY. See Insurance, Fire, 1.

DEPOSITIONS. See Evidence, 23.

DERAILMENT. See Master and Servant, 10.

DESCENT. See Deeds and Conveyances, 3; Estates, 11; Husband and Wife, 3, 9.

DESCRIPTION. See Taxation, 3.

DETENTION OF PRISONERS. See Statutes, 12.

DEVISE. See Estates, 2; Wills, 1; Constitutional Law, 1, 2; Husband and Wife, 9.

DISCHARGE. See Criminal Law, 14.

DISCRETION. See Courts, 1, 2, 5, 6; Municipal Corporations, 3.

DISCRIMINATION. See Carriers of Freight, 6; Constitutional Law, 5.

DISMISSAL AND NONSUIT.

Dismissal and Nonsuit— Motions— Evidence— Nonsuit.—A motion to dismiss an action for insufficient evidence comes too late after verdict. *Moore v. Milling Co.*, 408.

DISTRIBUTION. See Evidence, 35.

DOGS. See Animals, 1; Assumpsit, 2.

DOMICILE. See Wills, 8; Habeas Corpus, 4, 5.

DOWER. See Judgments, 15; Partition, 1; Estates, 10, 11.

Dower—Widows—Statutes—One Dwelling.—The widow's right of dower in her husband's lands and tenements is allowed to the same extent by our statute as theretofore existing, and thereunder she is entitled to but one-third thereof, including the dwelling-house in which her husband usually resided, and to no more, though this dwelling should be the only land or tenement subject to the right. Revisal, sec. 3084. *Caudle v. Caudle*, 537.

DRAFTS. See Banks and Banking, 1.

DRAINAGE DISTRICTS. See Judgments, 22.

1. *Drainage Districts — Statutes — Assessments — Notice — Publication— Deeds and Conveyances—Warranty.*—A motion in the cause, in proceedings for establishing a drainage district, by one who has conveyed lands therein, will be denied, when made on the ground that such person had not been personally served and has conveyed the land to another with warranty against liens or encumbrances when it appears that the purchaser, in possession, had been personally served, and the grantor lived only a few miles from the district wherein the work was in progress, and the statutory notices had been published to bring in the landowners, with ample time given for objection, exception, or appeal, under the requirements of the statute, which had not been observed or followed. *Taylor v. Comrs.*, 217.

2. *Drainage District—Owner's Consent.*—It is not necessary that an owner of land within a drainage district should have assented to its formation when the statutory number thereof have done so. *Ibid.*

3. *Drainage Districts — Assessments — Benefits — Findings by Clerk.*—An owner of lands in a drainage district is liable for a proper assessment in accordance with the benefits accruing to his lands, and it is immaterial that, on appeal from the clerk, the judge has stricken out from his findings that the improvements exceeded the benefits conferred. *Ibid.*

DRAINAGE DISTRICTS—*Continued.*

4. *Drainage Districts—Proceedings in Rem—Notice—Nunc Pro Tunc—Assessments.*—The proceedings for forming a drainage district are *in rem;* and where a valid statute has been complied with therein, and it appears that an owner has not been served with process, it is admissible to notify him, in possession, *nunc pro tunc,* and have the lands therein assessed. *Ibid.*

5. *Drainage Districts — Accruing Assessments — Date of Liens.*—Assessments upon lands in a drainage district formed under a statute become liens *in rem* from the time they are due and payable. *Ibid.*

6. *Drainage Districts—Assessments—Liens—Encumbrances—Deeds and Conveyances—Warranty.*—Assessments upon lands in a drainage district are liens *in rem,* resting upon the lands, into whosoever hands it may be at the time they accrue, and do not come within the terms of a warranty against encumbrances by deed. *Ibid.*

7. *Drainage Districts—Police Regulations—Health—Condemnation.*—The drainage of swamps and of surface water from agricultural lands in a drainage district are declared by chapter 442, Laws 1909, to be for the public benefit and conducive to the public health, etc., thus falling within the police regulations; and proceedings thereunder are in the exercise of the right of eminent domain. *Ibid.*

8. *Drainage Districts—Notice—Assessments—Laches.*—Where due notice by publication has been made, in the formation of a drainage district, and the report of the viewers has been confirmed by the clerk, without objection, exception, or appeal, the presumption is that an owner of land therein has not been found upon issuance of personal process; and the substituted service, nothing else appearing, is valid. *Ibid.*

9. *Drainage Districts — Judgments — Assessments — Statutes.*—A proviso in the petition limiting the amount of assessments to be made on lands within a drainage district being formed under the provisions of the statute, which was not inserted in the final judgment rendered in due course, may not at a subsequent term be supplied by amendment, being also contrary to the statutory provisions and invalid. *Mann v. Mann,* 354.

10. *Drainage Districts—Owner of Lands—Contracts—Damages—Drainage Commissioners—Judicial Acts—Fraud and Collusion—Individual Liability.*—The relation between the owner of lands within a drainage district created by statute and the commissioners thereof, the former in paying the assessment levied and the latter in laying out the district, cutting drainage canals, etc., in all respects in accordance with the requirements of the statute, is not in the nature of a contract for the failure to perform which, in respect to cutting a drainage ditch or removing obstructions therefrom, the drainage district is liable to the owner for damages done to his land by improper drainage, the commissioners having the right and power, in the exercise of their judgment, to correct and modify the details of the report of the engineer and viewers; and their acceptance of the work done under a contract in conformity with the maps and plans obtained according to the requirements of the statute, being a judicial act, it cannot be questioned, except for fraud and collusion, and then only to fix the commissioners with personal and individual liability. Chapter 442, sec. 21, Public Acts of 1909. *Craven v. Comrs.,* 531.

DRUGS. See Evidence, 2.

DRUNKENNESS. See Carriers of Passengers, 1.

DUE COURSE. See Bills and Notes, 2; Banks and Banking, 3.

DUPLICATE WRITINGS. See Principal and Agent, 9.

DWELLING. See Dower, 1.

EASEMENTS. See Railroads, 4.

1. *Easements — Pathways— Adverse Possession — User.*—In order for the owner of lands to acquire the right to use a passway over the lands of another to his own premises, the user must not only be under a claim of right for twenty years, but it must be open and with the intent to claim against the true owner, and not permissive. *Jones v. Swindell*, 34.

2. *Same— Deeds and Conveyances— Reverter— Permissive User.*—Where lands granted for church purposes, under certain conditions, with a path leading thereto, laid out by the grantor, since deceased, have reverted to the grantor under the provisions of the conveyance, and has been partitioned among his heirs at law, the one acquiring the land on which the church was situated does not acquire a right to the pathway by adverse user, for the pathway, having been opened for the benefit of those attending church, the natural right to its use, nothing else appearing, ceases upon the discontinuance of the church. *Ibid.*

3. *Same—Evidence.*—Where an heir at law of a deceased grantor claims the right, by adverse user, to a passway over lands of others, which has been divided in proceedings for partition, testimony that the parties had run a fence across the path before the proceedings were instituted is some evidence that the use was permissive and not adverse. *Ibid.*

EJECTING PASSENGERS. See Carriers of Passengers, 1; Appeal and Error, 6.

EJECTMENT.

1. *Ejectment—Issues—Pleadings—Equity.*—Where lands have been regularly sold under the terms of a deed in trust to secure borrowed money, and the purchaser, in his action to recover possession of lands, has shown his legal title, and the action has been tried without objection under the usual issue in ejectment, it is necessary for the defendant to plead any equity he may claim and tender proper issues thereon, and having failed to do so, the plaintiff is entitled to recover. *Holden v. Houck*, 236.

2. *Ejectment—Title—Burden of Proof—Issues— Answers— Instructions— Appeal and Error—Harmless Error.*—In ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of that of the defendant; and where, in his action to recover lands, the jury, by their answer to appropriate issues, under legal evidence and a correct charge, have found that the plaintiff's deed was procured by fraud, and therefore invalid to pass the title, thus defeating plaintiff's recovery, the charge on the other issues, raising only the question of defendant's title by adverse possession, etc., becomes immaterial. *Pope v. Pope*, 284.

ELECTIONS. See Road Districts, 1; Husband and Wife, 12; Taxation, 7; Contracts, 39.

1. *Elections—Primaries—Courts—Jurisdiction.*—In the absence of express statutory provision, the courts of the State have no jurisdiction to interfere with political parties in the choice of their candidates for office, nor to regulate or control the methods and agencies by which they are selected, except by appropriate legal remedies to enforce the performance of plainly ministerial duties or the protection of clearly defined legal rights existent and conferred usually by the Constitution and legislation applicable to the subject. *Brown v. Costen*, 63.

2. *Same—County Boards of Election—Statutes.*—Under the provisions of our primary law (chapter 101, Laws of 1915), the right of a voter to cast his ballot therein depends not only upon his legal status, but upon the good faith of his intent to affiliate with the party holding the primary, and his right in the latter respect is left to the determination of the registrar and judges of election, without power vested in the courts to supervise or control their action; and, this being an indeterminate political right, the decision of the county board must be considered final, so far as the courts are concerned, when the primary has been held in all respects in accordance with the provisions of the statute. *Ibid.*

3. *Same—Injunction.*—Where a primary has been held in accordance with the provisions of the statute (chapter 101, Laws of 1915), the courts have no jurisdiction to supervise or review the action of the local board of elections upon the question of whether a certain number of voters were qualified as to their party affiliation, etc., to vote thereat; and temporary injunction against its tabulating and publishing the ballots as returned by the registrars and poll-holders of the various townships, and declaring the nominee of the primary, is properly dissolved. *Ibid.*

4. *Elections—Electors—Oath—Qualifications—Registrars—Judge of Elections.*—The mere failure of the registrars to administer the oath to the electors, and allowing them to vote where not challenged, will not affect the result of the election held for the establishment of a special road district under valid legislative authority, when the electors so voting are qualified. Constitution, Art. VI, secs. 1 and 2. *Woodall v. Highway Commission*, 378.

5. *Elections—Irregularities—Statutes, Directory.*—The object of election laws is to afford the qualified voters a fair and full expression of their wills; and where the result has been fairly obtained and without fraud, it will not be defeated by mere irregularities in conducting the election. *Ibid.*

6. *Elections—Votes—Presumptions—Illegality—Burden of Proof.*—Where the vote of an elector has been received and deposited by the judges of the election, it is presumed to be a legal vote, with the burden upon the contesting party to show its illegality. *Ibid.*

7. *Elections—New Registration—Electors—Qualification—Statutes, Directory.*—Where the statute authorizing an election for the establishment of a special road district requires a new registration for the purpose, and the vote of an elector is received and deposited, it will not afterwards be held to be illegal if he is otherwise qualified to vote, though

ELECTIONS—*Continued.*

he may not have complied with the *minutiæ* of the registration law. *Ibid.*

8. *Elections—Electors—Oath.*—It is not the duty of an elector to see that he is duly sworn, and that the registrars and poll-holders observe the directory requirements of the statutes addressed to them. *Ibid.*

9. *Elections— Electors— Qualification — Evidence — Questions for Jury.*— The rulings of the judge and his charge to the jury as to the qualifications of electors voting under the "grandfather clause" of the Constitution (Revisal, sec. 4331), and also of the ability of others to qualify by reading the Constitution, etc., are approved, the question being for the jury, under the evidence in the case. *Ibid.*

10. *Elections—Qualified Voter—Majority Vote—School Districts.*—One who is qualified to vote at an election to establish a statutory special school district, requiring the levy of a tax, must be duly registered pursuant to law and having the present right to vote; and the requirement that the measure shall be carried by a "majority of the qualified voters," by correct interpretation, signifies a majority of the qualified voters of the district appearing upon the registration book, and not a majority of those voting in the election. *Williams v. Comrs.*, 554.

11. *Elections—Qualified Voter—Poll Tax.*—A voter within a proposed special school district who has not paid his poll tax is disqualified to vote at the election called for determining the question submitted. *Ibid.*

12. *Elections—Registration—Registrar—Erasing Names—Request of Voter —Statutes.*—When one who is qualified to vote at an election upon the question of establishing a statutory special school tax district has duly registered according to law, the registrar is without authority to erase his name from the registration book, at his request, the registration book being in the nature of a public record, which may not be changed, except by some method provided by law; the power to order a new registration or revise the "polling book" of voting precincts being conferred by statute on the county board of elections. Gregory's Supplement, sec. 4305. *Ibid.*

13. *Elections—Notice—Ballots—Taxation—Schools— Counties— Townships.* An election held under the provisions of chapter 71, Laws 1911, authorizing a township within a county to vote upon a tax to supplement its school funds, in the event the proposition were defeated in the county at large, wherein the notices of election only set forth the propositions as to the entire county, and merely referred to the statute, and was submitted upon a single ballot and defeated, only ascertained the will of the voters as to the entire county, and not of the voters of a township that had cast a majority vote in its favor, so that it would apply to that particular township alone. *Hill v. Lenoir County*, 573.

ELECTORS. See Elections, 4, 7, 8, 9.

ELECTRICITY. See Courts, 7; Evidence, 15, 40, 41; Negligence, 15.

1. *Electricity—Negligence—Evidence—Master and Servant—Proper Appliances—Trials—Questions for Jury.*—Where there is evidence tending to show that the plaintiff's intestate was killed by defendant's wires

ELECTRICITY—*Continued.*

strung along the top of its poles, heavily charged with electricity; that his hand came in contact therewith as he was descending from his work; that it was customary, under the circumstances, for the employees to unstrap the belt holding them at the top of the pole before coming down, and rely on their hands and spurs while descending; that rubber gloves were in common use to insulate and protect them, and that the defendant had furnished the intestate with improper or insufficient gloves, the proximate cause of the injury: *Held*, sufficient to take the case to the jury upon the question of the defendant's actionable negligence. *Clements v. Electric Co.*, 14.

2. *Electricity—Negligence—Evidence—Approved Appliances—General Use.* The defendant had installed an electrical equipment in the building of the employer of the plaintiff's intestate, who was killed by a current of electricity furnished by the defendant, while taking hold of an electric socket therein; and upon the question whether the socket furnished was a proper one, a charge to the jury upon the evidence, that the defendant was required to furnish sockets such as were "approved and in general use and reasonably adapted for the purpose to which they were put," is *Held* to be a proper one. *Smith v. Comrs.*, 467.

3. *Electricity — Negligence — Evidence— Questions for Jury— Appeal and Error.*—Where the defendant has installed an electrical equipment in the house of the employer of the plaintiff's intestate, which has been accepted by the employer, and the intestate was killed by catching hold of a socket, and there is evidence tending to show that the socket was a proper one and was safely used immediately preceding the injury, and the death could only have been caused by unusual or accidental occurrences: *Held*, the burden of proof was on the plaintiff to show the defendant's actionable negligence, and a verdict in favor of the defendant on the issue, under a proper charge, applying the rule of the "highest degree of care practicable," as to the installation and inspection of the defendant furnishing the current, will not be disturbed on appeal. *Ibid.*

4. *Electricity— Negligence— Evidence— Trials— Questions for Jury.*—Evidence tending to show that defendant, supplying electricity for motor power, was under contract to furnish a drug store with electricity, over a wire carrying a safe voltage, for operating mixing appliances for "soft drinks" at a fountain, and that plaintiff's intestate, employed there, was killed by a heavy voltage of electricity coming suddenly upon the wire from the primary wire of the defendant, because of insufficient insulation of the outside wires, misplacing of the poles, and delay in cutting out the current, etc., is held sufficient upon the issue of defendant's actionable negligence. *Raulf v. Light Co.*, 691.

ELECTRIC LIGHTS. See Municipal Corporations, 5.

ELECTRIC RAILROADS. See Carriers of Passengers, 4.

EMPLOYER AND EMPLOYEE. See Master and Servant; Railroads, 8, 15, 19.

ENCUMBRANCES. See Drainage Districts, 6; Insurance, Fire, 2.

ENDORSER. See Subrogation, 1; Bills and Notes, 4.

ENTRY. See State's Lands; Appeal and Error, 10, 12; Trusts and Trustees, 2.

EQUITY. See Insurance, 2, 11, 13; Estates, 5; Trusts and Trustees, 4, 10, 13; Reformation of Instruments, 1; Actions, 6; Husband and Wife, 5, 6, 11; Ejectment, 1; Wills, 7; Subrogation, 1; Corporations, 4; Judgments, 19, 20, 22.

ERASING NAMES. See Elections, 12.

ESTATES. See Wills, 1, 11; Reformation of Instruments, 1; Husband and Wife, 10.

1. *Estates — Rule in Shelley's Case — "Nearest Heirs" — Fee Simple.*—An estate to M., "in fee simple, all the days of his life, then it shall descend to his nearest heirs," vests in M. a fee-simple title, under the *Rule in Shelley's Case;* the words "nearest heirs" meaning simply the word "heirs." The history and meaning of the *Rule in Shelley's Case*, and its value at the present day, discussed by CLARK, C. J. *Crisp v. Biggs*, 1.

2. *Estates—Wills—Devise—Remainders— Class— Per Capita— Contingencies—Children—Ulterior Devise.*—A devise of lands to certain named of the testator's nieces for life, remainder to their children, but should they die without leaving children, then over to an ulterior devisee, and one of them die without children, survived by the other and her children, the surviving niece and her children take as a class, *per capita*, and not *per stirpes;* and the ulterior devisee takes nothing, as the contingency has not happened upon which he could acquire an interest, under the terms of the will. *Leggett v. Simpson*, 3.

3. *Estates—Rule in Shelley's Case—Deeds and Conveyances—Intent.*—The *Rule in Shelley's Case*, where applicable, is a rule of property without regard to the intent of the grantor or devisor. *Triplett v. Williams*, 149 N. C., 241, cited and distinguished. *Byrd v. Byrd*, 113.

4. *Estates — Rule in Shelley's Case — Fee-simple Title.*—A conveyance of land to B. and L. and their heirs, upon "the condition that they are to have a life estate in the above-described tract of land, and then" to their "bodily heirs," comes within the *Rule in Shelley's Case* and conveys a fee-simple absolute title to B. and L. *Ibid.*

5. *Same—Cloud on Title—Equity—Suits.*—The holders of the fee-simple title to lands may maintain a suit to remove a cloud upon their title against those who claim that the deed under which it is derived only conveyed a life estate, with the remainder in the claimants, and that the *Rule in Shelley's Case* had no application to the terms used in the conveyance. *Ibid.*

6. *Estates—Gifts—Remainders—Contingent Limitations—Tenants in Common — Rule in Shelley's Case — Deeds and Conveyances — Defeasible Fee.*—A gift of land to donor's named "grandson (a young child at the time) and his lawful heirs, children, if any; if not, to his brothers and sisters, respectively," conveys to the grandson a fee-simple title, defeasible upon his dying without children, in which event it would go to his brothers and sisters, the improbability thereof in a certain instance not being considered; and by the use of the word "respectively," as placed, neither the grandson and his children nor the grandson and his brothers and sisters take as tenants in common, but distinctively as a class, depending upon the happening or non-happening

ESTATES—*Continued.*

of the contingency of his dying without children. The *Rule in Shelley's Case* has no application. *Williams v. Blizzard*, 146.

7. *Estates—Defeasible Fee—Heirs of the Body—Statutes—Deeds and Conveyances.*—The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee-simple title, under our statute (Revisal, sec. 1578), does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her. *Smith v. Parks*, 406.

8. *Estates—Remainder—Acceleration—Wills.*—The doctrine of acceleration, by which the enjoyment of an expectant interest in lands is hastened, rests upon the theory that such enjoyment is postponed for the benefit of a preceding vested estate or interest, and that on the destruction or determination of such preceding estate before it would regularly expire, the ultimate takers should come into the present enjoyment of their property; and this doctrine applies to appropriate expressions in a will, when a contrary intent does not appear by a proper interpretation of its terms. *Young v. Harris*, 631.

9. *Same—Widow's Dissent.*—Where the doctrine of acceleration applies to the ulterior devisees under a will giving the testator's wife his real property for life or until she marry, her dissent to the will will have the same effect. *Ibid.*

10. *Same—Dower—Ultimate Devisee.*—A devise in trust to the benefit of the testator's wife for life or until she remarry, giving her the actual possession and occupancy of the farm and house in which the testator had lived, with implements required for the cultivation of the farm, but with limitation over to his heirs at law, for a division among whom the trustees shall immediately take possession upon the happening of either event: *Held*, the intent of the testator, nothing else appearing, was to postpone the distribution among the ultimate takers for the accomplishment of his primary purpose of providing for his wife during her life or widowhood, and upon the dissent of the widow from the will, the doctrine of acceleration will apply. *Ibid.*

11. *Estates—Remainders—Wills—Dissent—Dower—Acceleration—Ultimate Devisee—Deeds and Conveyances.*—Where the widow has dissented from the will of her husband and takes dower in lieu of the lands devised for her life or widowhood, thus accelerating the earlier vesting of the estate in the ultimate devisee, the deed to the land made by the ulterior devisee is subject to the dower right, and at her death his grantee acquires the title. *Ibid.*

ESTOPPEL. See Contracts, 23; Damages, 1; Partnership, 4; Judgments, 10, 15, 18, 24, 26; Deeds and Conveyances, 3, 6; Reference, 4; Limitation of Actions, 3; Injunction, 1; Husband and Wife, 12.

EVIDENCE. See Electricity, 1, 2, 3, 4; Executors and Administrators, 2; Partnership, 3; Malicious Prosecution, 1, 3; Easements, 3; Witnesses, 1; Insurance, 6; Appeal and Error, 2, 4, 5, 6, 7, 11, 12, 14, 18, 19, 22, 23, 32, 33, 37, 38, 40, 42, 43, 46, 47, 48, 53, 55, 60, 61, 62, 64; Wills, 3, 5; Negligence, 2, 6, 7, 9, 11; Master and Servant, 3, 4, 7, 9, 12; Pleadings, 2, 4;

EVIDENCE—*Continued.*

Trusts, 1; Assumpsit, 1; Instructions, 1, 4, 5, 6, 8; Railroads, 2, 3, 11, 15, 16, 18; Judgments, 9; Contracts, 8, 9, 12, 24, 28, 36, 37, 41; Vendor and Purchaser, 1, 3; Torts, 1; Reformation of Instruments, 1; Deeds and Conveyances, 2, 4, 5, 6, 8, 9; Mortgages, 1; Verdict, 2; Subrogation, 1; Principal and Agent, 7, 8, 9, 12, 13, 14, 15, 16; Betterments, 1; Bills and Notes, 3; Dismissal and Nonsuit, 1; Municipal Corporations, 5; Elections, 9; Courts, 6; New Trials, 3; Incest, 1; Limitation of Actions, 3, 4, 5, 8; Taxation, 2, 5; Partition, 1; Insurance, Fire, 2; Negotiable Instruments, 1; Husband and Wife, 13; Homicide, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10; Criminal Law, 1, 4, 6, 7; Receiving, 1, 3; Seduction, 2, 3, 4, 5, 6, 7.

1. *Evidence—Mental Capacity—Parties—Transactions and Communications—Deceased Persons—Deeds and Conveyances—Appeal and Error.* In an action to set aside a deed for want of sufficient mental capacity of the grantor, since deceased, to execute it, testimony of witnesses, who are parties to the action, as to their opinion of the mental capacity of the grantor and his physical condition thereto relating, is not such transaction or communication with a deceased person as is prohibited by Revisal, sec. 1631, and its rejection by the trial court constitutes reversible error. *Semble,* declarations of the deceased, when tending to show the basis of the opinion, are also competent when confined to the question of mental incapacity. *Barcliff v. R. R.*, 43.

2. *Same—Drugs—Morphine.*—Where, in an action to set aside a deed for mental incapacity of the grantor, there is evidence that she was old and sick at the time, and under the care of her physician, and the physician has testified, as a medical expert, that the administration of morphine for a long time would deteriorate the body and mind, testimony of a party to the action that morphine tablets were given the grantor continuously and freely at this time, whenever she was suffering, is some evidence tending to show a weakened state of the grantor's mind, under the circumstances, and improperly excluded. *Ibid.*

3. *Evidence—Corroboration—Instructions—Requests—Appeal and Error—Rules of Court.*—A witness may testify to statements he had made to the defendant's agent when in corroboration of his testimony; and where the record states that it was confined to that purpose, or there was no request made that it be so confined, it will not be considered as reversible error on appeal. Rule 27, 164 N. C., 438. *Perry v. Mfg. Co.*, 69.

4. *Evidence—Title—Common Source—Deeds and Conveyances—Location—Burden of Proof—Nonsuit.*—The plaintiff must show his title in his action to recover land; and when he claims a superior title, but under a common source with the defendant, and the cause has been accordingly tried in the Superior Court, he necessarily admits that the *locus in quo* is covered by the defendant's deed from such source, and upon judgment of nonsuit he may not justly complain that the burden of proof was on defendant to show that his deed covered the lands in dispute. *Heath v. Lane*, 119.

5. *Evidence—Pleadings—Extracts.*—A party to an action may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry, without introducing qualifying or explanatory matter, it being open to

EVIDENCE—*Continued.*

the opposing party to introduce such qualifying matter if he so desires. *Jones v. R. R.*, 261.

6. *Same—Explanation—Contributory Negligence.*—The defendant railroad company's actionable negligence being properly made to depend upon its engineer's suddenly and unexpectedly stopping its train in an unusual manner while making a flying switch, it is competent for the plaintiff to put in a clause of the defendant's answer relative to applying air brakes to slow down the train under the circumstances, and for the court to permit the defendant to introduce other portions of the answer, in explaining or qualifying the matter, and materially affecting the admissions, but allegations of contributory negligence, under the facts of this case, do not fall within the rule. *Ibid.*

7. *Evidence—Opinion—Expert—Witnesses—Issues of Fact—Questions for Jury—Appeal and Error.*—An expert opinion should be based upon the assumption of the finding of the jury, and a medical expert opinion based only on a statement of the occurrences as made to him by his patient is an invasion of the province of the jury to find the facts. *Plummer v. R. R.*, 279.

8. *Evidence— Deceased Persons— Transactions — Communications — Statutes—Restricted Testimony.*—Where a person claiming title to lands in controversy, through or under a deceased person, has testified to a transaction or communication with him relating to the lands, the adversary party is restricted in his testimony to evidence concerning the same matter. Revisal, sec. 1631. *Pope v. Pope*, 283.

9. *Same— Limitation of Actions— Parol Trusts— Trusts and Trustees.*— The plaintiff, having acquired a deed conveying the fee-simple title to the lands in controversy, may not testify to a transaction with his deceased grantor, whereby he claims that a parol trust was engrafted on his title in favor of another for life, and thus bar the defense of adverse possession set up by the defendant in the possession of the lands, when the defendant has not opened up this matter by his testimony; for the same is a transaction with the deceased person within the intent of Revisal, sec. 1631. *Ibid.*

10. *Evidence—Collective Facts—Opinion.*—A carpenter who was present at the time the plaintiff was injured while assisting to get out certain lumber in the course of his employment may testify as a fact, from his experience, that the defendant had not furnished sufficient help for the purpose, when relevant to the injury, and his testimony is not incompetent as opinion evidence. *Beaver v. Fetter*, 334.

11. *Evidence—Demurrer—Nonsuit.*—Where there is sufficient evidence to take the case to the jury after the introduction of the plaintiff's evidence, the defendant's demurrer thereto and renewed after all the evidence had been introduced is properly denied. *Ibid.*

12. *Evidence—Adverse Parties— Examination— Clerks of Court— Courts— Jurisdiction.*—Proceedings to examine an adverse party before the clerk or upon commission must be instituted after summons has been issued and action commenced, and on motion before the clerk of the Superior Court of the same county or the judge presiding over that court, or holding the courts of the district; and a clerk of another county, where the action is not pending is without jurisdiction over

EVIDENCE—*Continued.*

the proceedings, and his order made therein will be quashed. Revisal, sec. 866. *Vyne v. Fogle Bros.*, 351.

13. *Same—Appeal and Error—Fragmentary Appeals.*—An appeal to the Supreme Court will directly lie from the refusal of the Superior Court judge to vacate an order of the clerk of that court to examine an adversary party to an action pending in another county; and there being no cause therein in which an exception may be noted and preserved, an objection that the appeal is fragmentary cannot be sustained. *Ibid.*

14. *Evidence—Principal and Agent—Employment.*—Where the defendant is sued for damages for its alleged negligence in installing an electric equipment in a building, etc., causing the death of the plaintiff's intestate, testimony of plaintiff's witness as to work done by him when not in the defendant's employment, and after the injury, is properly excluded. *Smith v. Comrs.*, 466.

15. *Evidence—Expert Opinion—Questions for Jury—Electricity.*—Where the plaintiff's intestate is alleged to have been negligently killed by a voltage of electricity coming through the defendant's wire, upon an equipment it had installed, the amount of voltage upon the wire at the time, taking into consideration the surroundings of the intestate, the condition of the room in which he was killed, etc., is for the determination of the jury, and the opinion of an expert witness thereon is properly excluded. *Ibid.*

16. *Evidence—Opinion—Experts—Hypothetical Questions.*—The opinion of an expert must be upon a hypothetical state of facts, if found by the jury upon the evidence. *Ibid.*

17. *Evidence—Expert Opinions—Questions for Jury.*—Where the plaintiff's intestate has been killed by a voltage of electricity which he received when taking hold of an electric socket that had been put in the building for his employer by the defendant, as a part of an electrical equipment, for which the defendant furnished electricity, and the question has arisen on the trial, as to whether a porcelain or metal socket should have been used under the conditions the plaintiff claims to have existed at the time, the opinion as to the kind that should have been used is properly excluded as being upon a question for the sole determination of the jury. *Ibid.*

18. *Evidence—New Matter—Court's Discretion—Appeal and Error.*—The admission of new matter on redirect examination is within the sound legal discretion of the trial judge, and not reviewable on appeal, in the absence of its abuse. *Ibid.*

19. *Evidence—Character—Particular Acts.*—Evidence as to particular acts of misconduct is properly excluded on the question of the general character of a party to the action; in this case, whether the plaintiff in an action for damages for debauching his daughter had the reputation of selling whiskey in violation of law. *Tillotson v. Currin*, 479.

20. *Evidence—Deeds and Conveyances—Lost Deeds—Notice.*—Parol evidence of the contents of a lost deed in the chain of a controverted title is properly admitted when the proper notice to the adversary

EVIDENCE—*Continued.*

party has been given to produce it and the evidence shows that it was last in his possession. *Riddle v. Riddle*, 485.

21. *Evidence—Adverse Possession—State's Grants.*—Only the State's vacant and unappropriated lands are subject to entry, and where a party to an action involving title to lands claims that he held adversely at a certain date, evidence of a more recent entry of the lands in dispute is competent to contradict him. *Ibid.*

22. *Evidence—Negligence—Concurring Negligence—Nonsuit—Questions for Jury—Trials.*—A motion of nonsuit should not be granted, especially where, as under the facts of this case, the contributory negligence of the plaintiff, if any, and that of the defendant concurred in producing the injury complained of in the action. *Hudson v. R. R.*, 488.

23. *Evidence—Motions to Strike Out—Depositions—Agreements—Trials.*—Where the parties have agreed that depositions taken in the action should be opened and passed upon by the trial judge, a motion to strike out evidence as incompetent comes too late upon the trial, and not within the agreement made. *Ibid.*

24. *Evidence—Collective Facts—Opinions.*—Where the negligence of defendant railroad relates to its failing to keep a proper lookout on its backing engine enveloped in its own steam, testimony of eye-witnesses as to whether the intestate could have been seen in time to have avoided the injury if the lookout had been properly placed on the engine is competent as an instantaneous conclusion of the mind derived from observation of a variety of facts presented to the senses at the same time. *Ibid.*

25. *Evidence—Objections and Exceptions—Motion to Strike Out Evidence—Appeal and Error.*—*Semble*, the trial judge has no power to strike out, on motion, testimony which has previously been given, without objection, the statute requiring that exceptions to evidence must be taken at the time. *Ibid.*

26. *Evidence — Records — Independent Knowledge — Appeal and Error.*—Where records of a railroad company relating to shipments, or embargoes thereon, are relevant to the inquiry in an action upon contract between the users of the railroad, they are properly excluded from the evidence when the railroad agent, a witness by whom they are sought to be introduced, testifies he has no personal knowledge on the subject; and to make the records themselves competent, their authenticity must be sufficiently established (*Ins. Co. v. R. R.*, 138 N. C., 42); and upon appeal it must be made to appear that the entries were relevant to the issue. *Lumber Co. v. Lumber Co.*, 501.

27. *Evidence— Contracts— Commercial Rating— Irrelevancy.*—Evidence of the commercial rating of the plaintiff, seeking to recover damages for the breach by defendant of its contract to make shipments of lumber, defended upon a provision of the contract exempting defendant from liability by reason of embargoes upon the shipment, is irrelevant to the inquiry, and properly excluded. *Ibid.*

28. *Evidence — Federal Records — Certified Copies — Statutes — Distiller's Bonds—Principal and Surety.*—Under the Federal statutes, a distiller and the surety on his bond are made liable for all taxes and penalties

EVIDENCE—*Continued.*

imposed, when the taxes have not been duly paid by stamps, at the time and in the manner provided by law, as determined by the Commissioner of Internal Revenue and the assessment lists certified to the proper collectors, etc. In an action by the surety against the distiller to recover a penalty the former had paid on demand without notifying the latter, it is *Held*, that a certified copy of the assessment lists on record in a public office or department of the government was the best evidence of their contents, under the provisions of our statutes, and that parol evidence thereof is improperly admitted, constituting reversible error, to the defendant's prejudice. *Surety Co. v. Brock*, 507.

29. *Evidence—Nonsuit—Defendant's Evidence.*—Upon defendant's motion to nonsuit upon the evidence, the credibility of his evidence is for the jury, and the motion should be denied if there is sufficient evidence to take the case to the jury, when considered in the light most favorable to the plaintiff. *Clark v. Sweaney*, 530.

30. *Evidence—Nonsuit—Trials.*—The trial judge should consider the evidence in the light most favorable to the plaintiff, upon motion to nonsuit, and the motion should be denied if, so considered, it is sufficient to sustain the plaintiff's cause of action. *Rush v. McPherson*, 562.

31. *Same—Contracts—Immoral Contracts—Fraud.*—While the law will not enforce a contract which it prohibits as immoral or fraudulent, a motion as of nonsuit upon the evidence will be denied when there is evidence in the plaintiff's favor that he entered into the contract upon other and lawful motives, as where there is evidence that he had contracted with the purchaser at a commissioner's sale of land to have the bid assigned to him and receive the deed therefor, upon his paying the purchase price, after several attempts to sell the land had been made, without result, etc., and this with a lawful motive, and although there was evidence that his purchase, in this manner, tended to delay or defeat his judgment creditor while he was attempting to compromise the debt, it being a matter for the jury. *Ibid.*

32. *Evidence—Maps—Lands—Title.*—A map of the lands in dispute may not be received in evidence against an adverse claimant, though made by the county surveyor, when there is no evidence that the one in his chain of title, for whom it was expressed upon its face to have been made had it in his possession, or that it was made at his instance, or that he had received it as authoritative or correct; the statement thereon, standing alone, being inadmissible as hearsay. *Gates v. McCormick*, 640.

33. *Same—Ancient Documents.*—A map or document may not be received in evidence solely because it has the appearance of being old and faded, for it must have been in the possession of one in the chain of title of the adverse claimant and in recognition of its correctness, or it must be produced from a proper or natural custody, under circumstances that will tend to free it from suspicion or fraud or invalidity. *Nicholson v. Lumber Co.*, 156 N. C., 59, cited and applied. *Ibid.*

34. *Evidence—Letters—Authenticity.*—Where letters received by mail are sought to be introduced upon the trial as evidence against the opposing party to the action, the signature of the writer or other requisite proof of its authenticity must also be offered. *Arndt v. Ins. Co.*, 652.

EVIDENCE—*Continued.*

35. *Evidence — Parent and Child — Unequal Distribution— Trials— Appeal and Error—Harmless Error.*—Where the controversy is about the mental capacity of the donor to convey lands to certain of his children, and their undue influence over him, the admission of evidence as to an unequal distribution of his lands among his children, concerning which there was no serious controversy, is harmless, if erroneous. *Plemmons v. Murphy*, 672.

36. *Evidence— Opinion— Mental Capacity— Deceased Persons— Statutes— Transactions and Communications.*—After giving his opinion as to the mental incapacity of the deceased donor to make a deed sought to be set aside, the witness may testify as to the circumstances upon which his opinion is based, including personal transactions and communications with him, and, when properly confined, evidence of this kind is not objectionable under our statute (Revisal, sec. 1631). *Ibid.*

37. *Evidence—Deeds and Conveyances—Mental Capacity—Undue Influence —Parent and Child—Fraud—Nonsuit—Questions for Jury.*—While a son may make a fair appeal to his father's sense of gratitude for consideration and attention shown him in sickness, disease, or helpless old age, for a larger share of his property than that of the other of his children, whose conduct has been, perhaps, less deserving, he may not exercise an overpowering influence over the impaired or failing mind of his parent, caused by such conditions, to his own sordid advantage; and where there is sufficient evidence that an influence of this kind has been exerted by a son to procure a deed to his father's lands, it partakes of fraud in its nature, and will be set aside upon such evidence, and a finding to that effect. *Ibid.*

38. *Evidence—Motions—Nonsuit.*—The evidence, upon a motion to nonsuit an action involving the mental incapacity of the grantor of lands to make a deed, and undue influence exerted over him, should be considered in the light most favorable to the plaintiff, and if it is sufficient to sustain the action, when so considered, the motion will be denied. *Ibid.*

39. *Evidence— Witness— Prisoner— Under Death Sentence— Expiration of Sentence—Habeas Corpus—Statutes.*—When the State has procured the attendance of a witness under sentence of death, the objection by the defendant that he could not be procured by writ of *habeas corpus, ad testificandum* (Revisal, sec. 1855), is untenable, this not applying to the State; nor will objection avail that the time set for the execution had passed, and the witness, being dead, in the eye of the law could not testify, the witness having been present and having testified. *S. v. Jones*, 702.

40. *Evidence—Impressions—Collective Facts—Electricity.*—Where there is evidence that the defendant's wires, heavily charged with a deadly current of electricity, came in contact with another and harmless wire of the defendant, and caused the death of the plaintiff's intestate, it is competent for an eye-witness to testify that where the wires crossed they made a short circuit, producing light, indicating that the wires had not been properly wrapped, such being his impression of facts under his immediate observation and within his experience. *Raulf v. Light Co.*, 691.

41. *Evidence— Expert— Electricity—Issues—Appeal and Error— Harmless Error.*—Where the defendant's liability for the killing of the plain-

EVIDENCE—*Continued.*

tiff's intestate is made to depend upon its negligence in permitting an improperly insulated wire, admittedly charged with a deadly current of electricity, to come in contact with an otherwise harmless wire, thus producing the death, a question asked an expert, and affirmatively answered, "whether the conditions arising on the facts stated, if so found by the jury, would naturally and inevitably lead to intestate's death," while not approved, is not held for reversible error, there being no question of the deadliness of the current, and not objectionable as involving the very fact the jury were to pass upon. *Ibid.*

42. *Evidence — Silence — Admissions — Larceny and Receiving — Criminal Law.*—The narration by a witness of circumstances, in the presence of the defendant on trial for receiving stolen goods, etc., tending to convict him of the offense, is not objectionable as attempting to show an admission, by his silence, of matters he was not required to deny, when the witness also testified that the defendant then admitted its truth, and at least harmless to the extent that he relied thereon by his own evidence in defense. *S. v. Wilson*, 751.

43. *Evidence—Maps—Homicide.*—A witness may use a map of the premises where a homicide has been committed to explain and illustrate his evidence relevant to the guilt of the prisoner charged with the crime, when restricted to that purpose. *S. v. Spencer*, 709.

44. *Evidence — Corroboration — Identity.*—Where the accused has denied that he was present when the homicide, by shooting, had been committed, and a witness has testified as to his identity that he was a man she had seen leaving the locality soon thereafter, with further testimony that he was the same person who had shot at a dog on the road, such evidence is competent in corroboration of his identity as the one who committed the homicide, and also as to the fact that he had a pistol at the time. *Ibid.*

45. *Evidence—Homicide—Natural Evidence.*—Where the appearance of a dog, as it returned home after being shot at by the prisoner accused of a homicide, is relevant to the inquiry, testimony as to his conduct is natural evidence, and an instantaneous conclusion of the mind from a variety of facts observed at the same time in regard to it is competent, under the doctrine of *S. v. Leak*, 156 N. C., 643, cited and applied. *Ibid.*

46. *Evidence—Homicide—Identity—Opinion.*—It is competent for a witness to give his impression or opinion as to the identity of the prisoner with a man she saw fire a pistol at a dog, from what she saw and knew of him theretofore, when relevant to the inquiry, upon the trial for a homicide. *Ibid.*

47. *Evidence— Corroboration— Statements to Others— Witnesses.*—A witness may testify, in corroboration of his statements on the stand, that he had made the same or similar statements to other persons. *Ibid.*

48. *Evidence—Homicide—Footprints.*—With other evidence tending to convict the prisoner of a homicide, it may be shown that his shoes fitted the footprints leading from the place of the crime, as a circumstance tending to show identity, its value as proof being greater or less, according to circumstances. *Ibid.*

49. *Evidence— Identification— Homicide — Clothes — Questions for Jury— Trials.*— Where the prisoner, accused of homicide, has denied that he

EVIDENCE—*Continued.*

was at the place of the crime when it was committed, and there is evidence that a man was then seen leaving the place wearing a white scarf, testimony that the sheriff had referred to the prisoner's wearing a white scarf, in his presence, without his denial, is competent; and as to whether the prisoner understood that it referred to the time of the homicide, or subsequently thereto, under the evidence in this case, was properly submitted to the jury, with correct instructions as to its bearing upon the case. *Ibid.*

50. *Evidence— Identification— Homicide—Reformatory.*—Where a witness has testified that the prisoner on trial for a homicide was the same as a man she saw in a reformatory, it is competent to show that only one man with the prisoner's name had been in that reformatory, for the purpose of identification, in connection with the other and pertinent evidence in the case tending to show his guilt. *Ibid.*

51. *Evidence— Contradiction— Circumstance— Homicide.*—Where the prisoner, on trial for homicide, denied he was at the place at the time of its commission, and has contradicted himself as to where he then was, stating, among other things, that he was at a certain theater, testimony of the owner of the theater in contradiction is competent as a circumstance to be considered by the jury. *Ibid.*

EXAMINATION. See Witnesses, 2; Appeal and Error, 2; Evidence, 12.

EXCEPTIONS. See Reference, 2, 5; Appeal and Error, 49.

EXCUSABLE NEGLECT. See Judgments, 1, 2, 5, 7; Appeal and Error, 1.

EXECUTION. See Wills, 2, 4; Corporations, 2.

EXECUTORS AND ADMINISTRATORS. See Husband and Wife, 3; Judgments, 15.

1. *Executors and Administrators—Limitation of Actions—Pleas—Fraud—Collusion.*—The administrator, in failing to plead the statute of limitations in favor of the heirs at law, must act in perfectly good faith, free from coercion or undue influence, and upon full and diligent investigation as to the *bona fides* or validity of the debt presented to him; and if he has been guilty of such gross negligence as to indicate that he has utterly disregarded the rights of the heirs in favor of the creditor, it amounts to collusion and fraud in law, entitling the heirs to relief against the judgment obtained in consequence. *Twiddy v. Mullen*, 16.

2. *Same—Evidence—Trials—Questions for Jury.*—Where an administrator, who is the choice of the judgment creditor, and the latter's brother is on his administration bond, fails to plead the statute of limitations on an old and out-of-date note of the intestate, and judgment has been obtained without pleadings filed on the day after the administrator was appointed and suit had been brought on this note in the intestate's lifetime, with nothing to show its termination, it is sufficient evidence to set aside the judgment, in favor of the heirs at law, upon the ground of collusion and fraud between the administrator and the creditor. *Ibid.*

EXECUTORS AND ADMINISTRATORS—*Continued.*

3. *Executors and Administrators—Limitation of Actions—Pleas.*—The plea of the statute of limitations by an administrator is frequently a just plea to protect the decedent's estate from unjust demands, when time has destroyed the evidence. *Ibid.*

EXPERTS. See Appeal and Error, 18; Evidence, 7, 15, 16, 17.

EXPLOSIONS. See Vendor and Purchaser, 2.

EXPRESSION OF OPINION. See Courts, 7; Appeal and Error, 31.

GARAGE. See Nuisance, 1.

GASOLINE. See Nuisance, 1.

GASOLINE CAR. See Master and Servant, 10.

GENERAL DESCRIPTION. See Statutes, 11; Criminal Law, 9.

GIFTS. See Estates, 6; Husband and Wife, 6.

GOOD FAITH. See Betterments.

GRANTS. See Appeal and Error, 10.

GUARDIAN AND WARD. See Appeal and Error, 24; Courts, 4.

Guardian and Ward—Attorney and Client—Attorneys' Fees—Amount—Courts—Contracts.—Where it is proper for the attorneys for a ward, employed by the next friend, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for the sole determination of the court, irrespective of any contract that may have been made, to be fixed with regard to the value of the services in relation to that of the estate; and under the circumstances of this case, the Supreme Court, on appeal, reduced the amount, fixed by the Superior Court judge, from $1,000 to $500. *In re Stone*, 337.

HABEAS CORPUS. See Evidence, 39.

1. *Habeas Corpus—Infants—Parents.*—The parents are *prima facie* entitled to the custody of their minor children, with the preference in favor of the father, if the choice is between them, when they are equally worthy and fitted therefor; though, when both are equally worthy, it may be awarded to the mother when it is shown that the best welfare of the child requires it. *In re Means*, 307.

2. *Same—Nonresident Parent—Orders—Bonds—Jurisdiction.*—Where, on appeal in *habeas corpus* proceedings brought by the wife to obtain the custody of her infant daughter from her husband, it has been found upon supporting evidence that the husband is unfitted to retain the child; that he had theretofore left it with its mother in another State and had secretly taken the child therefrom and brought it to this State and placed it with his own mother and sisters, who were well qualified and suitable therefor; and also that the mother was a fit and suitable person to have her child and give it the support, care and attention it required: *Held*, that on the facts presented in this record, an order of the lower court awarding the custody of the child to the mother is a proper one; and a requirement that she should permit the child to visit its father here, and, being a nonresident, that she give bond to obey the orders of the court, is improperly made. *Ibid.*

HABEAS CORPUS—*Continued.*

3. *Habeas Corpus — Infants — Unsuitable Father — Custody Delegated— Rights of Mother.*—Where a nonresident mother has properly been awarded the custody of her child in *habeas corpus* proceedings in the courts of this State, against the claim of her husband, its father, and it has been found that the father of the child is an unfit and unsuitable person, the fact that he had placed the child with his own mother and sisters, who are fit and suitable, will not have any effect upon the rights of the mother to its custody. *Ibid.*

4. *Habeas Corpus — Parents — Wife — Independent Domicile.*—Where the misconduct of the husband has forced his wife to leave him, she may acquire an independent domicile which may determine that of an infant child whose custody she seeks to obtain in the proceedings in *habeas corpus* against her husband. *Ibid.*

5. *Habeas Corpus—Parents—Nonresidents—Courts—Jurisdiction—Foreign Domicile—Awards Not Final.*—An award in *habeas corpus* proceedings does not finally determine the rights of the parties to the custody of the child sought in *habeas corpus* proceedings; and where, in our courts, the award has been in favor of a nonresident mother against the father of the child, the courts, properly established and having jurisdiction at the domicile of the mother, may further hear and determine the matter touching the care and control of the child on such changed conditions, properly established, that would require it. *Ibid.*

HARMLESS ERROR. See Appeal and Error, 3, 5, 7, 54; Instructions, 3.

HEALTH. See Contracts, 6; Drainage Districts, 7.

HEIRS. See Estates, 3; Wills, 1; Deeds and Conveyances, 3.

HIGHWAYS. See Roads; Road Districts, 3.

HOLOGRAPH. See Wills, 6, 10.

HOMICIDE. See Appeal and Error, 57; Evidence, 43, 45, 46, 48, 49, 50, 51.

1. *Homicide—Murder—Accessory—Criminal Law— Evidence— Statutes.*— Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. Revisal, sec. 3287. *S. v. Jones*, 702.

2. *Homicide — Murder — Evidence — Accomplice.*—The unsupported testimony of an accomplice is sufficient for conviction of murder, though evidence of this character should be received with caution, and the court, in his discretion, may so instruct the jury. *Ibid.*

3. *Homicide— Murder— Notice— Evidence— Trials.*—When there is sufficient evidence to establish the fact that the prisoner, on trial for murder in the first degree, had committed the homicide, it is competent to show that the deceased had $180 on his person on the evening before his body was found, when he and the prisoner were drinking together, and had only a few dollars the following morning, and that the prisoner soon thereafter, when arrested, had $246 on his person, as tending to show that robbery was the motive of the homicide. *S. v. Atwood*, 704.

HOMICIDE—*Continued.*

4. *Homicide — Murder — Evidence — Instructions.*—Where the prisoner, accused of murder, has denied committing the crime, and that he had dragged the body from his door and covered up the signs thereof with sand, which the evidence tended to show had been done, and thereafter admitted the killing and dragging the body away, but relied upon justification, it is for the jury to estimate the weight to be given to his explanation, under all the circumstances leading up to the killing and connecting him with it; and a request for instruction that the jury could only consider his removing the body, as it may throw light on the killing, and if this had been done under circumstances justifying it, they could not consider the evidence of the removal of the body as being a crime, was properly refused. *Ibid.*

5. *Homicide — Murder — Character — Substantive Evidence.*—Where the prisoner, accused of a homicide, testifies to matter in justification or to disprove inferences to be drawn from the evidence against him, he puts his character at issue, both as a witness and defendant, and the jury may consider the evidence of character as substantive evidence of whether he would or would not commit a crime of the kind charged against him. *Ibid.*

6. *Homicide — Murder — Deadly Weapon — Malice — Presumptions — Evidence.*—Where a homicide is admitted or proven to have been done with a deadly weapon, the law presumes malice, and the burden is upon the prisoner to show matters in excuse or mitigation. *Ibid.*

7. *Homicide — Instructions — Evidence — Intent — "Either" — Words and Phrases.*—Upon a trial for murder, the prisoner and his near relatives testified in behalf of the defense, and the wife and mother of the deceased in behalf of the State; and a charge by the court to the jury that they were to scrutinize the testimony of all these witnesses, but after doing so, if they found the testimony of "*either*" of the witnesses worthy of belief, to give it the same weight as if the particular witness had no interest in the result of the verdict, is not erroneous, the word "*either*" being used in the sense of "any," and referring to all of these witnesses. *S. v. Wentz*, 745.

8. *Homicide—Evidence, Circumstantial.*—Where the prisoner, tried for a homicide, denies that he was present at the time, the State may show that he was present by circumstantial evidence, which, in this case, is held sufficient to be submitted to the jury. *S. v. Spencer*, 709.

9. *Homicide— Murder— Evidence— Deadly Weapon—Manslaughter—Mitigation—Burden of Proof—Instructions.*—Where the evidence tends to show that the homicide was committed with a pistol, fired by the accused three times, each shot taking effect, and that he shot the husband of the deceased as he afterwards approached the house, without evidence in his behalf tending to reduce the crime to manslaughter, and his sole defense was that he was not there at the time and consequently could not have committed the crime, with sufficient circumstantial evidence to convict him of it, there is no element of manslaughter in the case, and an instruction to the jury to that effect is proper. *Ibid.*

10. *Homicide— Deadly Weapon— Malice— Presumption— Courts — Verdict Directing—Trials—Instructions.*—Evidence that the prisoner killed the deceased with a deadly weapon, in this case, by striking him with

HOMICIDE—*Continued.*

the barrel part of a double-barreled gun, raises a presumption of malice, which he must justify by showing matters in mitigation or excuse; and an answer of acquittal on an issue as to murder in the second degree may not be directed thereon by the court. *S. v. Johnson*, 722.

11. *Homicide—Threats—Evidence—Trials.*—Threats made by one accused of homicide, though uttered while under arrest, are admissible as evidence on the trial, when they were voluntarily made, or without threat, compulsion, or inducement. *Ibid.*

12. *Same—Threats—Motive.*—Testimony of continuous and repeated threats made by the prisoner on trial for a homicide, against the deceased, up to six months before its commission, and of a feud between them, growing out of a dispute over certain lands, of some years duration, are competent evidence as to motive, upon the trial. *Ibid.*

13. *Same—Feud—Possession of Lands.*—Where a feud over lands existed between the prisoner upon trial for a homicide and the deceased, a witness may testify that the prisoner was in possession of the land, upon the question of motive, such testimony not being objectionable as an expression of a legal inference. *Ibid.*

HUSBAND AND WIFE. See Principal and Agent, 5; Bills and Notes, 4.

1. *Husband and Wife—Married Women—Contracts—Separate Property—Constitutional Law.*—The real property of the wife, whether acquired before or after marriage, remains her sole and separate property (N. C. Const., Art. X, sec. 6), and therein the husband has no vested interest, but merely the power to refuse his written assent to her conveyance thereof. *Kilpatrick v. Kilpatrick*, 182.

2. *Husband and Wife—Married Women—Conveyance to Husband—Probate—Certificate—Statutes.*—Where the wife has conveyed her lands with her husband's written consent, and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction to secure notes given in part payment of the purchase price, payable to herself and husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of Revisal, sec. 2107, making a contract between husband and wife void which changes a part of her real estate or impairs the body of the capital of her personal estate unless in writing, etc., and unless it appears in the probate, to the satisfaction of the officer "that the same was not unreasonable or injurious to her," etc. *Ibid.*

3. *Same—Executors and Administrators—Descent and Distribution.*—In an action by the personal representative of the deceased wife to recover notes from her husband that were given in consideration of a sale of her real property, with mortgage back, and payable jointly to her husband and herself, but void under the provisions of Revisal, sec. 2107: *Held*, the administrator is entitled to recover them to settle the estate of the decedent and for distribution among her next of kin. The husband, the defendant in this action, may not hold the same under the recent statutes of distribution (ch. 166, Laws 1913, amended

HUSBAND AND WIFE—*Continued.*

by ch. 37, sec. 2), but is entitled only to his distributive part through the administration. *Ibid.*

4. *Husband and Wife—Wife's Separate Estate.*—A wife is entitled to her separate estate, and to receive the rents and profits therefrom, whether living with or apart from her husband. *Nelson v. Nelson*, 191.

5. *Same—Betterment—Equity—Statutes.*—Permanent improvements put by the husband upon the lands of his wife, knowing that the lands were her separate estate, and not by mistake in honest belief that they were his own, does not entitle him to recover for betterments, upon any principle, equitable or otherwise. *Ibid.*

6. *Husband and Wife—Wife's Separate Estate—Improvements—Gift—Equity—Liens.*—Where the husband knowingly places permanent improvements on the separate real estate of his wife, they will be presumed, nothing else appearing, to have been a gift to the wife, and no equitable lien in his favor can be presumed. *Arrington v. Arrington*, 114 N. C., 119, cited and applied. *Ibid.*

7. *Husband and Wife—Deeds and Conveyances—Written Consent—Constitutional Law.*—Article X, section 6, of our Constitution makes the written consent of the husband necessary to the wife's conveyance of her lands. *Stallings v. Walker*, 321.

8. *Husband and Wife—Mortgages—Foreclosure—Tenant by the Curtesy—Husband a Purchaser—Title.*—Where a husband and his wife have given a deed in trust to secure an endorser on their joint note to a bank, and upon default in payment, after the death of the wife, the trustee forecloses, and it appears that there were children of the marriage born alive capable of inheriting, the husband has a life estate in the land as tenant by the curtesy, and he may become the purchaser at the sale to the extent necessary to protect his own interest, and upon the payment of the purchase price acquire a good title when there is no suggestion of fraud or unfair dealing in the transaction. *Wilson v. Vreeland*, 505.

9. *Husband and Wife—Deeds and Conveyances—Separate Estate—Purchase of Lands—Resulting Trusts—Tenant by the Curtesy—Descent and Distribution—Devise—Constitutional Law.*—The purchase by the husband of land with money belonging to the separate estate of the wife, with conveyance to the husband and wife by entirety, is not a gift by the wife to her husband of her personal property, and, though thus conveyed at her request, creates a resulting trust in the lands in her favor; and after her death, in the absence of devise (Constitution, Art. X, sec. 6), the husband, as tenant by the curtesy, acquires a life interest therein, and upon his death the land descends to the heirs at law of the wife, a child of the marriage in the present instance. *Deese v. Deese*, 527.

10. *Husband and Wife—Deeds and Conveyances—Separate Estate—Justices of the Peace—Certificates—Statutes—Probate—Courts.*—Where land, purchased with the wife's separate estate, has been conveyed to the husband and wife, the conveyance, if otherwise sufficient to apply the law of *jus accrescendi*, would be inoperative to do so upon the failure of the justice of the peace to make the certificate required by Revisal, sec. 2107. *Ibid.*

HUSBAND AND WIFE—*Continued.*

11. *Husband and Wife—Wife's Separate Property—Deeds and Conveyances —Probate—Statutes—Adverse Possession—Equity—Cloud on Title.*— Where the wife conveys her separate realty to her husband under a deed void for failure of compliance with Revisal, sec. 2107, as to the execution and probate of the wife's deed, the living thereon of the husband and wife until his death, and her continuing thereon thereafter, affords no evidence that he obtained and held the lands adversely to her, and a deed subsequently made by her to another cannot be considered as a cloud upon the title to the lands of the husband's heirs at law. *Shermer v. Dobbins*, 547.

12. *Husband and Wife—Wills—Wife's Separate Property—Deeds and Conveyances— Void Deed— Statute— Election— Estoppel.*—A wife is not estopped by taking under her husband's will to deny the validity of her deed conveying to him her separate realty, void for noncompliance with Revisal, sec. 2107, when there is nothing definite in the will to show that he was attempting to devise her separate realty or to put her to her election, and the devise to the wife was evidently in lieu of the year's provision and dower. *Ibid.*

13. *Husband and Wife—Wife's Separate Property—Deeds and Conveyances —Void Deeds—Evidence—Declarations.*—Oral declarations of the wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with the Revisal, sec. 2107. *Ibid.*

14. *Husband and Wife—Wife's Separate Property—Deeds and Conveyances —Probate—Statutes—Void Deeds—Adverse Possession—Title.*—There is no presumption of ouster or of adverse possession in favor of the husband having children of the marriage, upon evidence tending to show that he lived with his wife on her separate realty during their joint lives, such as to ripen title in him under her void deed, made without compliance with Revisal, sec. 2107, regarding the execution and probate of the wife in such instances, a stricter degree of proof being required in such relationship. *Ibid.*

HYDRANTS. See Municipal Corporations, 3, 5.

IDENTIFICATION. See Criminal Law, 5, 49, 50.

IDENTITY. See Evidence, 44, 46.

IMMORAL CONTRACTS. See Evidence, 31.

IMPLIED PROMISE. See Parent and Child, 5.

IMPRESSIONS. See Evidence, 40.

IMPROVEMENTS. See Husband and Wife, 6; Landlord and Tenant, 1, 2.

INADVERTENCE. See Judgments, 21.

INCEST.

Incest— Seduction— Criminal Law— Accomplice — Influence — Evidence— Questions for Jury.—While, generally, an action will not lie when the plaintiff must necessarily base the cause of action on her own violation of the criminal law, and a single act of sexual intercourse, within the prohibited degree of consanguinity, constitutes the offense of in-

INCEST—*Continued.*

cest, the consent of the female is not always essential to the guilt of the male; and where the defendant is the grandfather of the plaintiff in a civil action, and there is evidence tending to show that he had raised her from her infancy; had slept in the same bed with her, and, at the age of 16, by the exercise of his influence, had induced her to believe the act was not wrong, and thus designedly accomplished his purpose when she was innocent and virtuous: *Held*, it is for the jury to determine whether the plaintiff was a voluntary accomplice in the commission of the crime, or whether she yielded under the undue and dominating influence of the defendant. *Strider v. Lewey*, 448.

INDEPENDENT CONTRACTOR. See Contracts, 10, Negligence, 8.

INDEX. See Register of Deeds, 1.

INDICTABLE OFFENSE. See Slander, 1.

INFANTS. See Judgments, 8; Habeas Corpus, 1, 3.

INFLUENCE. See Wills, 2; Incest, 1.

INJUNCTIONS. See Elections, 3; Trusts and Trustees, 11; Nuisance, 2; Taxation, 8; Vendor and Purchaser, 5.

1. *Injunction—Judgment—Estoppel.*—An injunction obtained in a former action between the same parties, on the same subject-matter, will not operate as an estoppel in the present suit, the remedy being by enforcement of that judgment, and not by a new action. *Shute v. Shute*, 462.

2. *Injunction—Public Policy—Multiplicity of Suits—Stock—No-Fence Law.* Where a proposed "no-fence" district has not been established according to the statute (Revisal, sec. 1675), equitable relief by injunction will lie against those who permit their stock to run at large and trespass upon the rights of others, upon the ground that such is against the well-settled policy of the State, and that multiplicity of suits will be prevented. *Marshburn v. Jones*, 517.

INJURY. See Damages, 1; Master and Servant, 13.

INNOCENT PURCHASER. See Banks and Banking, 3.

IN PARI DELICTO. See Judgments, 20.

INQUIRY. See Receiving, 3.

INSANITY. See Wills, 3; Statutes, 12.

INSTRUCTIONS. See Evidence, 3; Appeal and Error, 10, 52, 54, 56; Vendor and Purchaser, 2; Carriers of Passengers, 3, 4; Damages, 2; Railroads, 7, 17, 18, 20; Verdict, 2; Ejectment, 2; Negligence, 9; Taxation, 2, 5; Insurance, Fire, 2; Homicide, 4, 7, 9; Contracts, 42; Receiving, 2; Criminal Law, 3; Seduction, 5.

1. *Instructions—Issues—Consolidated Actions—Evidence—Contradictions—Appeal and Error—Reversible Error.*—Where two actions are consolidated and tried together, by consent, and submitted to the jury on one set of issues, and the evidence in one of these actions, as to the negligence alleged and the damages, is materially different and con-

INSTRUCTIONS—*Continued.*

tradictory of the evidence in the other action, a charge to the jury thereon, without distinction, is reversible error. *Sultan v. R. R.*, 136.

2. *Instructions— Contracts— Breach— Appeal and Error— Objections and Exceptions.*—In the purchaser's action to recover damages against the seller for breach of contract in failing to ship lumber in carload lots to several designated points, it appeared that the defendant accepted the order upon conditions, one of them being that if shipment could not be made "on account of embargoes to destination called for within something like ninety days, we shall be at liberty to sell the stock where it can be shipped, provided you are not in position to have it diverted to some other point to which it can be shipped." The cause was tried upon the question of whether the failure of the defendant to ship to the designated points was by reason of the embargoes. The judge properly charged the jury upon the law relating to this phase of the case, and the jury having answered the issue in defendant's favor, the plaintiff excepted that the charge was incomplete, upon the theory that the defendant should have notified the plaintiff of its failure to ship on account of embargoes: *Held*, the exception should have been on a tender and refusal of a proper prayer for instruction, and under the circumstances of this case, the proximity of the plaintiff, with available means of communication, etc., and the cause having been tried upon a different theory, no reversible error is found. *Lumber Co. v. Lumber Co.*, 500.

3. *Instructions—Construed as a Whole—Erroneous in Part—Appeal and Error—Harmless Error.*—Where the defendant denies liability for breach of contract to ship out lumber in carload lots to designated points, under a provision therein exempting it from liability if unable to ship on account of embargoes "called for something like ninety days," and with privilege in that event to ship it elsewhere, provided the purchaser was "not in position to have it diverted to some other point," etc., an instruction that the defendant would not be liable if plaintiff gave shipping instructions to points under embargo at the time, when standing alone, is erroneous, the contract requiring that the defendant's obligation to ship shall continue for at least ninety days; but construing the charge as a connected whole, as given in this case, it properly signifies and the jury must have readily understood that the obligation to ship was continuous for the stated period, and no reversible error is found. *Ibid.*

4. *Instructions — Incomplete Charge — Phases of Evidence.*—Where the trial judge assumes to charge the law upon one phase of the evidence in controversy, the charge is incomplete unless embracing the law applicable to the respective contentions of each party to the action. *Lea v. Utilities Co.*, 512.

5. *Instructions—Verdict Directing—Written Contracts—Parol Evidence.*—Where a written contract is alleged and sued on, without allegation or evidence of fraud, and the evidence sought to be introduced only tended to vary the admitted writing, an instruction by the court that if the jury believed the evidence, to answer the issues in the plaintiff's favor is a proper one. *Galloway v. Goolsby*, 636.

6. *Instructions — Issues — Evidence — Restrictions.*—Where a deed is attacked for want of mental capacity in the donor and undue influence

INSTRUCTIONS—*Continued.*

exercised upon him, and there is relevant evidence that there had been an unequal division of his property among his children, the parties to the action, the declarations of one of the parties thereof should be restricted to his interest, and a charge of the court which confines the consideration of the jury to the declarant and directs them not to affect the others in like interest, is a proper one, the presumption being that the jury will properly regard the instruction. *Plemmons v. Murphey*, 671.

7. *Same—Requests—Rules of Court.*—Where the declarations of a party to an action are admissible as to him alone, and the judge has so instructed the jury, an objection that the instruction was not sufficiently definite will not be sustained, unless there was a request to make it so, which was refused. Supreme Court Rule No. 27, 164 N. C., 438. *Ibid.*

8. *Instructions—Appellant's Evidence—Evidence—Questions for Jury—Trials.*—Instructions predicated upon the appellant's version of the contract sued on, which was for the determination of the jury under conflicting evidence, are properly refused. *Sloan v. Guano Co.*, 690.

9. *Instructions — Contentions — Objections and Exceptions — Appeal and Error.*—Misstatements made in the charge of the judge as to the contentions of the parties will not be considered on appeal when not called to the attention of the court at the proper time for him to correct them. *S. v. Spencer*, 710.

INSURANCE. See Insurance, Fire; Appeal and Error, 3; New Trials, 3; Principal and Agent, 15, 16.

1. *Insurance, Life—Change of Beneficiary—Conditional Interests—Application—Rules and Regulations.*—A beneficiary under a life insurance policy, with reasonable rules and regulations of the company providing that the insured may change, the beneficiary acquires only a condition interest under the terms of the policy until the death of the insured; and where the policy or rules of the insurer provides that such change may be made in a particular way, the method prescribed should be followed; but when the insured, by his affirmative act, has substantially done all that is required of him, or what he is reasonably able to do, to effect a change of the beneficiary, with nothing remaining to be done except the ministerial acts of the insurer, the consent of the beneficiary is not necessary and the change will take effect though the formal details are not completed by the insurer before the death of the insured. The company itself consented in this case. *Wooten v. Order of Odd Fellows*, 52.

2. *Same—Equity.*—Where the insured, given the right to change the beneficiary in his policy of life insurance, has pursued the course required by the policy and the rules of the association, and have done all in his power to make the change, but dies before the new certificate is actually issued, leaving only the ministerial acts of the company to be done in perfecting the change, equity will decree that to be done which ought to be done, and will act as though a new certificate had been issued or the change contemplated had been made. *Ibid.*

3. *Same—Acceptance—Waiver.*—Where, under the rules and regulations of a life insurance company, the insured is given the right to change the beneficiary, with the consent of the company, the required consent

INSURANCE—*Continued.*

is solely for its protection, which it may waive by accepting the written notice and making entry of the change on its policy record, etc.; and the beneficiary, as changed, having an insurable interest, will be entitled to the proceeds of the policy, though the company had issued the new policy thereafter, and after the death of the insured. *Ibid.*

4. *Same—Implied Promise—Parol Agreement.*—Where the insured has the right to change the beneficiary of his policy of life insurance, under the rules and regulations of the company, by a prescribed method, which he has followed and which has been accepted by the company, the acceptance by the company is equivalent to an implied agreement that the proper change had been made in sufficient form, or to an implied promise to make the change, which will be upheld, where the issuance of another policy is required, as an oral promise to insure. *Floars v. Ins. Co.*, 144 N. C., 232, cited and applied. *Ibid.*

5. *Same—Lost Policy—Reissuance.*—Where the insured has the right to change the beneficiary of his life insurance policy by having the change made on the face of the policy, which has been lost, or to the reissuance of the policy as changed, and has followed the method prescribed by the rules and regulations of the company in requesting the latter, which has been approved by it, its approval of the request, or assent thereto, is sufficiently formal, and the proceeds of the policy are payable to the beneficiary as thus changed, though the policy was not actually issued until after the death of the insured. *Ibid.*

6. *Insurance—Evidence—Principal and Agent—Policies—Change of Beneficiary.*—It is competent for the local officer of an insurance society, who has been requested by the insured, since deceased, to write out his application for a change of beneficiary of his policy of life insurance, where the policy has been lost, and the request approved by the company, to state what the insured said to him at the time he wrote the application for him. *Ibid.*

7. *Insurance—Parol Evidence—Writing—Independent Fact.*—It is competent for the proper officer of an insurance order to state that a written application for the change of beneficiary under a policy of insurance had been received at his office, as an independent fact; and it is not objectionable on the ground that the writing is the best evidence. *Ibid.*

8. *Insurance—Principal and Agent—Local Agent—Implied Authority.*—A local agent of an insurance company has no implied authority to bind the company to provisions or options not contained in the policy as afterwards written and properly issued and accepted by the insured *Graham v. Ins. Co.*, 313.

9. *Insurance—Prior Transactions—Merger.*—Transactions leading up to the issuance of a policy of life insurance merge therein upon its issuance and acceptance by the insured, and, under our statute, the terms and conditions of the insurance must be plainly expressed in the policy as issued. Chapter 54, Laws of 1899; Pell's Revisal, sec. 4775.. *Ibid.*

10. *Same—Principal and Agent—Local Agent—Options—Estimates—Policy Contracts.*—Estimates of the value of options made up by the local agent of a life insurance company, filled in by him on a printed form furnished by the company, unknown to or unauthorized by its proper

INSURANCE—*Continued.*

officials, or included within the terms, or referred to or attached to the policy thereafter issued, are not binding as a part of the policy contract. *Ibid.*

11. *Insurance—Reformation of Contracts—Equity—Principal and Agent—Local Agents.*—Evidence tending to show that the local agent of a life insurance company had furnished the insured his estimate of value of certain options contained in the policy thereafter issued by filling out spaces left in printed forms sent out by the company, and without evidence that its proper officials either knew of or ratified them, is not sufficient in a suit to reform the policy for mutual mistake or fraud. *Ibid.*

12. *Insurance—Principal and Agent—Local Agent—Options—Policy Contract—Statutes.*—The exercise of an option given by a mutual life insurance company to one of its policy-holders of greater value than that given to the others is an illegal and void discrimination, prohibited by our statute and general principles of law. *Ibid.*

13. *Insurance — Reformation of Contracts — Equity — Laches.*—Where the plaintiff has accepted a policy of life insurance and kept it for fifteen years without objection, she has lost, by her laches, the equitable right to have it reformed for fraud or mistake. *Ibid.*

14. *Insurance—Fraud—Policy—Contract—Waiver.*—Where the insured, being able to read and write, after having kept his policy of life insurance in force for a number of years, seeks to avoid it and recover the premiums he has paid thereon, on the ground of fraudulent representations by the defendant's agent as to its paid-up value, and it appears that he had paid another premium thereon after he had been correctly informed as to the facts, which were clearly expressed in the face of the policy itself: *Held*, he was put to his election before the payment of the last premium, either to invalidate the policy upon establishing fraud, or to recognize the contract as written, and his voluntarily paying this premium after knowledge was a waiver of this right, and barred his action based on the ground of the alleged fraud. *Arndt v. Ins. Co.*, 653.

INSURANCE, FIRE. See Appeal and Error, 46.

1. *Insurance, Fire—Denial of Liability—Proof of Loss—Waiver.*—The insurer's denial of liability upon its fire insurance policy is a waiver of its right to require the proof of loss therein specified. *Mercantile Co. v. Ins. Co.*, 545.

2. *Insurance, Fire—Title—Encumbrances— Payment— Evidence—One Inference — Verdict Directing — Instructions.*—Where the policy of fire insurance specifies that the title to the property destroyed is in the insured, testimony of the insured that there had been a chattel mortgage thereon, but it had been paid off and discharged before the issuance of the policy, permits but one inference to be drawn, if found to be true by the jury, and an instruction to that effect is a correct one. *Ibid.*

3. *Insurance, Fire—Contract—Title—Deeds and Conveyances—Registration.*—An unregistered deed to lands is good as between the parties, and meets the requirement of an insurance policy as to unconditional ownership of title, when executed and delivered before the issuance of

INSURANCE, FIRE—*Continued.*

the policy, with consideration paid and sufficient to pass the title, though registered thereafter. *Proffitt v. Ins. Co.*, 680.

4. *Insurance, Fire—Policy—Contract—Proof of Loss—Waiver—Principal and Agent.*—The proof of loss required in a policy of fire insurance may be waived by the agent and attorney of the insurer having the adjustment thereof in charge for his principal, as where he informed the insured that nothing further was required of him when this proof had not been made. *Ibid.*

5. *Insurance, Fire—Policy—Contracts—Denial of Liability—Waiver.*—Exception made to evidence on the examination of the witness-in-chief, and not given until his reëxamination, should be objected to at the time of its admission, for the exception to its admission to be passed upon on appeal. *Ibid.*

6. *Insurance, Fire—Proof of Loss—Waiver.*—A motion to nonsuit, in an action to recover the loss, by fire, under an insurance policy, upon the ground that the required proof of loss had not been made by the insured, will be denied when there is evidence of a waiver thereof by the authorized agent of the insurer. *Ibid.*

7. *Insurance, Fire—Policy—Contracts—Proof of Loss—Denial of Liability —Waiver.*—The denial of liability for loss under a policy of fire insurance by the president and treasurer of the insurer is a waiver of the stipulation of the policy requiring proof of loss. *Ibid.*

INTEREST. See Insurance, 1; Bills and Notes, 1; Judgments, 13, 14; Principal and Agent, 10; Partnership, 4; Parent and Child, 5.

INTERSTATE COMMERCE COMMISSION. See Carriers of Freight.

INTERVENOR. See Bills and Notes, 2, 3.

INVALIDITY. See Judgments, 25.

IRREGULARITIES. See Elections, 5.

ISSUES. See Betterments, 1; Instructions, 1, 6; State's Lands, 1; Appeal and Error, 9, 13, 44, 45, 49; Reference, 2, 5; Ejectment, 1, 2; New Trials, 1; Evidence, 41.

Issues — Form — Sufficiency.—The form of issues submitted to the jury upon the trial of an action is immaterial, if they are germane to the subject of the controversy, permit each party to present his version of the facts and view of the law, and the case may thereunder be tried upon its merits. *Plemmons v. Murphey*, 671.

JEOPARDY. See Criminal Law, 11.

JOINT TORTS. See Actions, 7.

JUDGMENTS. See Appeal and Error, 1, 13, 16, 25, 26, 44, 50, 51; Damages, 1; Pleadings, 3, 7; Corporations, 2; Drainage Districts, 9; Deeds and Conveyances, 6; Limitation of Actions, 3; Injunctions, 1; Parties, 1; Contracts, 31; Criminal Law, 11, 12.

1. *Judgments— Excusable Neglect— Motions—Different County—Courts—Jurisdiction.*—Exceptions to the hearing of a motion to set aside, for

JUDGMENTS—*Continued.*

excusable neglect, a judgment rendered in another county, is to the jurisdiction, affects a substantial right, and may not be entertained without the consent of the parties. *Cahoon v. Brinkley*, 5.

2. *Judgments— Motions— Excusable Neglect—Attorney and Client—Attorney's Change of Residence—Notice—Calendar.*—Where the defendant has employed counsel to represent him in an action, and for ill health the counsel has since moved permanently to another State, it is notice to the client and it becomes his duty to get another attorney to represent him; and when he has been duly served with summons, complaint filed, and the cause duly calendared for trial, it is notice thereof to him, and after judgment his laches is not excusable, and his motion to set it aside should be denied. *Ibid.*

3. *Judgments, Irregular.*—Where a cause of action is at issue and regularly set on the calendar, and tried upon the issues before the jury, and judgment rendered in open court, it is not objectionable as an irregular judgment. *Ibid.*

4. *Same—Copy of Pleadings.*—Where the plaintiff's attorney has promised the defendant's attorney to furnish him with a copy of the complaint, and the latter attorney has permanently left the State, the defendant's laches in failing to get another attorney to represent him is not excused by the failure of the plaintiff's attorney to furnish the promised copy. *Ibid.*

5. *Judgments—Excusable Neglect—Attorney and Client—Neglect of Attorney.*—A client will be relieved against a judgment by default taken against him through the negligence of his attorney. *Holland v. Benevolent Assn.*, 86.

6. *Same—Neglect of Client.*—A physician, the president of a corporation and having in charge an action against it, spoke to an attorney about representing the corporation and understood that he had undertaken to do so, contrary to the understanding of the attorney. At a term of the court when the attorney was sick in a hospital, under the physician's care, a judgment by default was taken against the corporation: *Held*, it was the duty of the physician, as president of the corporation, to question the attorney, and his neglect in not looking after the case and employing other counsel was not excusable. *Ibid.*

7. *Judgments— Excusable Neglect— Principal and Agent— Attorney and Client.*—Where the defendant in a proceeding to establish the true divisional line between adjoining owners of land is a nonresident of the State, has duly accepted service on the summons in the proceeding, and entrusted the matter to his resident general agent, and it appears that this agent did not employ an attorney, but sent the tenant on the land to attend to the case on the return day of the summons, and this tenant was informed that an answer was required to be filed, the case continued from time to time, and notice given him that judgment would be taken by default if answer should not have been filed by a certain time, and judgment by default was accordingly taken: *Held*, the fact that the tenant did not communicate to the general agent the necessity for filing an answer does not excuse the general agent or the defendant himself from taking the necessary steps

JUDGMENTS—*Continued.*

in filing the answer, and the judgment may not properly be set aside for excusable neglect. *Stallings v. Spruill*, 121.

8. *Judgments—Pleadings—Admissions—Bills and Notes—Failure of Consideration—Infants—Deeds and Conveyances—Warranty.*—Where defendant alleges in his answer that a negotiable note sued on was given in the purchase of lands from the plaintiff and another, and a failure of consideration for want of title, but fails to deny the plaintiff's allegation that he is a holder of the instrument in due course, before maturity: *Held*, the question raised as to the consideration for the note prevents the rendition of a judgment against the defendant upon admission in the pleadings, which is not affected by the fact that the plaintiff was under twenty-one years of age when conveying the land, and may not be liable upon his warranty. *Parker v. Horton*, 144.

9. *Judgments—Pleadings—Admissions—Allegations in Answer—Evidence.* In rendering judgment upon the pleadings, the matters alleged as a defense must be regarded and dealt with as if established by the evidence. *Ibid.*

10. *Judgments—Justices' Courts—Appeal—Estoppel.*—Judgment in proceedings in summary ejectment, brought before a justice of the peace, wherein the plaintiff has set up a tax deed to the defendant's land to show title in himself, will not operate as an estoppel against the defendant's right to maintain a suit in the Superior Court to remove the tax deed as a cloud upon his title, when the proceedings in ejectment are still pending in the Superior Court on appeal, the trial in the latter court being *de novo* and the justice's judgment not a final one. *Sutton v. Dunn*, 202.

11. *Judgments—Contracts—Breach—Measure of Damages—Lumber.*—In an action, with claim and delivery, for breach of contract and for possession of property, alleging that defendant was to receive $6 per thousand feet for lumber cut and "racked up" on the yard, with an additional $2 per thousand for hauling and loading it for shipment, the defendant alleging that the $6 were allowed as partial payments by installments, the verdict of the jury, upon the evidence, and under proper instructions, finding for the plaintiff, both as to the right of possession and the terms of the contract, entitles the defendant to receive only the $6 per thousand feet for cutting and "racking up" the lumber on the yard, and a judgment allowing him $8 per thousand feet therefor includes payment for services for hauling and loading the lumber for shipment, which he has not rendered, and to which he is not entitled. *Southerland v. Brown*, 187.

12. *Judgments—Consent—Contracts.*—A judgment entered with the consent of the parties is a contract between them in respect to the subject-matter. *In re Chisholm's Will*, 211.

13. *Same—Date of Payment—Delayed Payment—Interest.*—Where a consent judgment for a recovery of a certain sum is made a lien on lands, and by its terms payable ninety days from its rendition, it bears interest from the first day of the term, the time given being merely for the purpose of raising the money for its payment; and where the only question submitted to the court is whether interest is chargeable from the date it was payable to a further period beyond, interest for such extended period at the rate of 6 per cent should be allowed. *Ibid.*

JUDGMENTS—*Continued.*

14. *Judgments— Contracts— Interest—Caption—Statutes—Interpretation.*— In Revisal, sec. 1954, the heading punctuated "Contracts, except penal bonds and judgments to bear" (interest), etc., should be read as if a comma had been placed between the word "bonds" and the words "and judgments." *Ibid.*

15. *Judgments— Estoppel— Dower— Statutes— Executors and Administrators—Sales of Land to Make Assets.*—The statute, Revisal, sec. 3082, gives the right of dower to the widow of the deceased free from the payment of his debts, etc., and where she has not dissented from the will of her husband, but has been made a party to proceedings brought by the administrator, C. T. A., to sell lands to pay debts due by the estate, she is not estopped by the final judgment therein to claim her right of dower from the insolvent estate, as such right was not at issue or properly included in the administrator's proceedings; and this applies to the net proceeds from a sale thereunder of part of the lands as well as to an unsold remainder thereof. The conflicting decisions as to estoppel by judgment reconciled by ALLEN, J. *Trust Co. v. Stone*, 270.

16. *Judgment — Estoppel — Drainage Districts — Amendments.*—Where the final judgment in proceedings to form a drainage district, under a statute, has omitted to include a reservation in the petition that the assessments on the lands should not exceed a certain amount per acre, and an injunction against a greater assessment has been refused by final judgment, in a later action, this judgment operates as an estoppel between the same parties to have the judgment in the first proceedings amended so as to incorporate therein the limitation sought to be imposed. *Mann v. Mann*, 353.

17. *Judgments — Amendments — Subsequent Term.*—A final judgment rendered in due course in proceedings to establish a drainage district may not be amended at a subsequent term of the court to supply an alleged omission to limit the assessments to be made on the land in accordance with that stated in the petition, there being nothing to show that the judgment was not recorded by the clerk as actually given to him, or that it had been omitted by inadvertence of the judge or the mistake of any one. *Ibid.*

18. *Judgments — Estoppel — Parties — Subject-matter — Form of Action.*— Where a final judgment has been rendered between the same parties on the same subject-matter, it is not essential that a later action or proceeding be identical in form for it to estop the parties therein, as *res judicata*. *Ibid.*

19. *Judgments—Correction—Equity.*—One who has been defeated on the merits in an action at law cannot afterwards resort to a bill in equity upon the same facts for the same redress. *Ibid.*

20. *Judgments— Third Persons— Equity— Innocent Persons— In Pari Delicto.*—Upon this motion, made in the cause to amend a final judgment in proceedings to form a drainage district so as to restrict the amount of assessments made upon the lands after the issuance of bonds thereon, the principles are applied that the one of two innocent persons must suffer whose conduct has occasioned the loss. *Ibid.*

JUDGMENTS—*Continued.*

21. *Judgments—Amendments—Inadvertence—Laches—Drainage Districts.* Where by motion at a subsequent term of the court a final judgment entered in proceedings to establish a drainage district, under the provisions of a statute, is sought to be amended so as to include a provision limiting the amount of assessments to be made on the lands, the mere failure of the parties at the time to request that the provision be inserted in the judgment does not, alone, entitle them to the relief sought. *Ibid.*

22. *Judgments—Amendments—Laches—Equity—Drainage Districts.*—The parties having failed for nine years after final judgment, in proceedings to establish a drainage district, to proceed for a correction of this judgment therein have lost their equitable right by their laches, if any they had, to have the judgment amended so as to supply an omission caused by inadvertence or mistake, etc. *Ibid.*

23. *Judgments—Amendments—Statutes—Laches.*—A motion for relief from a judgment coming within the provisions of Revisal, sec. 513, because of mistake, inadvertence, surprise or excusable neglect, should be made within the time fixed by the statute; and if a motion to amend a final judgment in proceedings under the statute to form a drainage district comes within the intent and meaning of this section of the Revisal, the parties will lose their rights by failing to act in the time required. *Ibid.*

24. *Judgments—Estoppel.*—To estop by adversary judgment *in personam*, it is required that the court have jurisdiction of the class of cases to which it belongs, and if the parties thereto, and subject-matter thereof, the question of the subject-matter to be determined by the controversy between the parties as set forth in the pleadings; and in proper instances the judgment will conclude the parties as to all matter directly in issue, and also as to such as are within the scope of the pleadings which were material and relevant, or were in fact investigated and determined at the hearing. *Holloway v. Durham*, 550.

25. *Same—Pleadings—Extraneous Matters—Invalidity.*—A judgment of the court upon matters beyond the scope of the pleadings, and which undertakes to settle and determine those entirely foreign to the controversy, is, to that extent, not binding, and may be treated as a nullity, even in a collateral proceeding. *Ibid.*

26. *Judgments — Estoppel — Consent — Pleadings — Extraneous Matters.*—While a judgment entered by the consent of the parties, with the sanction and approval of the court, may be considered as somewhat in the nature of a contract, and, in proper instances, may be entered and given effect as to any matters properly included therein, of which the court has general jurisdiction, without regard to the pleadings, this cannot apply, under the doctrine of estoppel by judgment, to extraneous matters not embraced in the pleadings or in the consent judgment entered thereon. *Ibid.*

27. *Same—Municipal Corporations — Sewage — Nuisance.*—Entering a consent judgment against a city for damages—past, present and prospective—caused to the plaintiff's land by dumping raw sewage into a stream, for and on account of all causes of action set forth and sued upon "in the complaint, and in full for all damages to the plaintiff, his

JUDGMENTS—*Continued.*

heirs and assigns, or to their property, by the building, etc., of the defendant's plant," etc., "the same being on a tract of land, distant from plaintiff's land about 150 yards," does not include within items terms damages to the plaintiff's other land afterwards acquired, and as to damages to this land the judgment will not operate as an estoppel, the words "buildings, etc., of the defendant's plant" referring to its structure and maintenance, when properly conducted, and not to its "negligent operation," which creates a nuisance, to the plaintiff's injury. *Ibid.*

JUDICIAL ACTS. See Drainage Districts, 10.

JUDICIAL INVESTIGATIONS. See Slander, 12; Criminal Law, 9, 10, 14.

JURISDICTION. See Judgments, 1; Elections, 1; Justice of the Peace, 1; Actions, 4, 6; Appeal and Error, 15; Wills, 8; Habeas Corpus, 2, 5; Courts, 3, 4; Evidence, 12.

Supreme Court — Jurisdiction — Opinion Certified.—After the Supreme Court of this State has certified its opinion and remanded the case to the Superior Court, it is without further jurisdiction except when it is properly before it upon petition to rehear (Rule 52, 174 N. C., 841), and may make no further orders therein. *R. R. v. Horton*, 115.

JURORS. See Appeal and Error, 63.

JUS ACCRESCENDI. See Principal and Agent, 6.

JUSTICES OF THE PEACE. See Courts, 3; Husband and Wife, 10.

1. *Justices of the Peace—Courts—Jurisdiction—Bills and Notes—Land.*—Where an action to recover interest due upon a note, according to its terms, is cognizable in the court of a justice of the peace, his jurisdiction is not ousted by reason of the note having been executed for the purchase of land. *Parker v. Horton*, 144.

2. *Justices of the Peace — Pleadings, Written — Admissions.*—Where the parties to an action before a justice of the peace have elected to file written pleadings, the pleadings are subject to the rule that material allegations in the complaint not denied by the answer stand admitted. Revisal, sec. 1458. *Ibid.*

KNOWLEDGE. See Partnership, 2; Master and Servant, 13; Receiving, 3.

LABORERS. See Mechanics' Liens, 1, 2, 4, 5.

LACHES. See Trusts and Trustees, 4; Drainage Districts, 8; Insurance, 13; Judgments, 2, 22, 23; Principal and Agent, 16.

LANDLORD AND TENANT. See Appeal and Error, 50.

1. *Landlord and Tenant—Contracts—Statute of Frauds—Parol Contracts — Improvements — Equity — Statutes.*— The lessor may terminate a parol lease of land to "continue so long as the lessee may pay the agreed rent," because the statute, Revisal, sec. 916, requires leases of this character to be in writing, but a further agreement to allow the lessee to remove improvements he has placed thereon, or compensate him therefor, is not an interest in lands coming within the meaning of the statute of frauds, and upon the lessor's terminating the agree-

LANDLORD AND TENANT—*Continued.*

ment he must compensate the lessor therefor to the extent the improvements have enhanced the value of the land, both under the terms of the parol agreement and under the equitable principle that, having acquiesced in and received the benefit of the agreement, he must pay therefor. The doctrine of betterments, under Revisal, sec. 652, has no application to the facts of this case. *Ferrell v. Mining Co.*, 475.

2. *Landlord and Tenant—Contracts—Improvements—Orchards.*—Where a lessee of land, by parol agreement, may recover of his lessor the value of improvements to the extent they may have enhanced the value of the leased land, the planting of a fruit orchard, coming within its terms, are to be regarded as improvements for which a recovery may be had. *Ibid.*

3. *Landlord and Tenant—Equity—Improvements—Vendor and Purchaser.* The principle permitting a vendee of land, under a parol contract, to recover as much of the purchase money as he may have paid the vendor, who repudiates the agreement, less a reasonable rent, thus placing the parties *in statu quo*, is applied to this case, wherein the lessor terminated a parol contract, invalid because not in writing, Revisal, sec. 976, whereunder the lessee was to receive compensation for the improvements he had put upon the land. *Ibid.*

LANDS. See Conversion, 1; Justices of the Peace, 1; Pleadings, 6; Mortgages, 1; Wills, 7; Deeds and Conveyances, 7.

LAPPAGE. See Pleadings, 6.

LARCENY. See Receiving, 1, 2, 3; Criminal Law, 3; Evidence, 42.

LAST CLEAR CHANCE. See Negligence, 14; Railroads, 18.

LEASES. See Appeal and Error, 50.

LESSOR AND LESSEE. See Contracts, 6.

LETTERS. See Wills, 10; Evidence, 34; Principal and Agent, 13; Appeal and Error, 47.

LIABILITY. See Bills and Notes, 4; Negligence, 15.

LIENS. See Mechanics' Liens, 1, 2; Assumpsit, 1; Husband and Wife, 6; Drainage Districts, 5, 6; Corporations, 2; Railroads, 14.

Liens—Materialmen—Notice—Subcontractors—Balance Due.—The right of one who furnishes materials to a subcontractor to a lien upon the building does not depend upon the state of the account between the contractor and the subcontractor, but upon the amount due the contractor by the owner at the time of the proper filing of the notice in the manner and form required. *Powder Co. v. Denton*, 427.

LIGHTS. See Municipal Corporations, 3.

LIMITATION. See Corporations, 5.

LIMITATION OF ACTIONS. See Executors and Administrators, 1, 3; Partnership, 1; Actions, 1; Master and Servant, 2; Betterments, 1; Animals, 2; Trusts and Trustees, 1; Principal and Agent, 4, 16; Evidence, 9; Railroads, 9, 14; Deeds and Conveyances, 8.

LIMITATION OF ACTIONS—*Continued.*

1. *Limitation of Actions—Deeds and Conveyances—Contracts—Reformation—Mistake—Pleadings—Answer—Burden of Proof.*—Where the defendant in an action to set aside a deed to lands for fraud and mistake alleges, as the basis of a counterclaim, that the deed should be reformed to include a parol agreement by the plaintiff, the owner, to build houses of a certain class to enhance the value of the property, the plea of the statute of limitations put the burden upon the defendant, in the cross-action, to show that the statute of limitations, Revisal, sec. 395 (9), had not barred his right, by a lapse of more than three years from the time he discovered the mistake to the time he had filed his pleading, and in failing to introduce such evidence he is concluded as a matter of law. *Taylor v. Edmunds*, 326.

2. *Limitation of Actions—Tenants in Common—Deeds and Conveyances—Adverse Possession.*—Where the grantee of a tenant in common of the entire tract of lands enters into possession of the whole thereof, the statute of limitations begins to run against all of the tenants in common, or their grantees, from that time; and the position that such grantee acquired only the undivided interest of his grantor in the commonable land is untenable, being contrary to the express terms of the conveyance and the character of the possession held thereunder. *Gill v. Porter*, 451.

3. *Same—Judgments—Estoppel—Parties—Privies—Evidence—Declarations.*—The grantee of a tenant in common of the entire tract of land before the institution of proceedings to partition them is not a privy to such proceedings or estopped by the judgment therein; and where he has entered under his deed and claims title by adverse possession, the acts or declarations of the parties to the proceedings cannot affect his rights. *Ibid.*

4. *Limitation of Actions—Adverse Possession—State Title—Evidence—Nonsuit—Questions for Jury—Trials.*—There being evidence of the adverse possession of a party to this action, involving the title to land, for more than thirty years, it is held sufficient to take the title out of the State and ripen his own title, and a motion for judgment as of nonsuit thereon was properly refused. *Riddle v. Riddle*, 485.

5. *Limitation of Actions—Title—Adverse Possession—Tax Lists—Admissions—Evidence.*—The original tax list offered on defendant's cross-examination, over his signature, which fact he admitted, showing that the land in controversy had been listed by him in the name of plaintiff's ancestor, under whom they claim, within a shorter period than twenty years, is evidence against the defendant's claim of title by adverse possession for the twenty-year period. *Gilcson v. Terry*, 534.

6. *Limitation of Actions—Bills and Notes—Administrators—Statutes.*—Where the maker of a note has died before the statute of limitations has run thereon, the payee may institute his action within one year after the issuing of letters testamentary, provided such letters were issued within ten years after the death of the debtor, Revisal, sec. 367, being an enabling statute; and where the note has not been barred, the foreclosure of a deed in trust, securing it, may be ordered. Revisal, sec. 391 (3). *Geitner v. Jones*, 542.

7. *Limitation of Actions—Mutual Accounts—Reciprocal Credits—Store Accounts.*—To constitute a mutual account, so that the last item of

LIMITATION OF ACTIONS—*Continued.*

charge thereon will repel the bar of the statute of limitation, it must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of our decisions nor the statute applicable. Revisal, sec. 375. *Hollinsworth v. Aiken*, 629.

8. *Limitation of Actions—Adverse Possession—Evidence—Questions for Jury—Trials.*—The use and occupation of land, as from its nature and character it is capable of, dealt with so as to indicate an assertion of ownership, in opposition to the world, or its true owner, openly and notoriously, under a claim of right, and known and visible boundaries, or color of title defining its boundaries, is sufficient evidence of adverse possession, if continued in for the statutory periods applicable, to ripen the title in the person thus claiming it. *Patrick v. Ins. Co.*, 661.

LOSS OF SERVICE. See Parent and Child, 4.

LUMBER. See Judgments, 11; Sales, 3.

MALICE. See Malicious Prosecution; Homicide, 6, 10.

MALICIOUS PROSECUTION.

1. *Malicious Prosecution—Criminal Law—Parties—Evidence.*—Testimony that the recorder issued a warrant against the plaintiff in an action for malicious prosecution, in which the defendant was the prosecutor; that the defendant, as prosecutor therein, had employed an attorney to investigate the matter, who filled out and signed the warrant, and the defendant was present and testified at the trial of the criminal action, and paid fee of prosecuting attorney, is sufficient to connect the defendant with the criminal prosecution and make him liable in damages therefor. *Brown v. Martin*, 31.

2. *Malicious Prosecution—Criminal Law—Compensatory and Exemplary Damages—Malice—Ill-will.*—Legal malice, in causing the arrest, is necessary in an action to recover damages for malicious prosecution, and may be inferred by the jury from the want of probable cause as a basis for awarding compensatory damages; but to recover punitive damages, in the discretion of the jury, the plaintiff must further show that the criminal act was wrongfully instituted from actual malice in the sense of personal ill-will, or under circumstances of insult, rudeness, or oppression, or in a manner which showed the reckless and wanton disregard of the plaintiff's right. *Ibid.*

3. *Same—Evidence.*—In an action to recover damages for malicious prosecution, evidence tending to show that the prosecutor in the criminal action took the defendant therein, about 16 years of age, aside, before the trial, charged him with stealing his money, offered to give him half if he would confess and surrender the remainder, in so threatening a manner that he "had to tell him something," is sufficient as tending to prove the personal ill-will necessary to sustain a recovery of punitive damages, and that the defendant was not moved by consideration of the public interest in instituting the criminal prosecution, but for the purpose of extorting money. *Ibid.*

MANSLAUGHTER. See Homicide, 9; Criminal Law, 6.

MAPS. See Municipal Corporations, 2; Deeds and Conveyances, 1; Appeal and Error, 12; Evidence, 32, 43.

MARRIED WOMEN. See Husband and Wife, 1, 2; Constitutional Law, 1, 2.

MASTER AND SERVANT. See Negligence, 9; Railroads, 15, 16.

1. *Master and Servant — Employer and Employee — Federal Employers' Liability Act—Statutes.*—The Federal Employers' Liability Act, Fed. Stat., Anno., 1909 Supp., p. 584, regulating suits for physical injuries or death of employees of railroads while engaged as common carriers of interstate commerce, wrongfully caused by the negligence of the officers, agents or employees of such carriers, or by reason of negligence in their cars, engines, appliances, machinery, etc., so essentially modifies the common-law actions of negligence that all suits coming under its provisions are properly regarded as statutory and affords the controlling and exclusive rule of liability in suits of this character in instances in which it excludes liability, as well as those in which liability is imposed. *Belch v. R. R.*, 22.

2. *Master and Servant — Employer and Employee — Federal Employers' Liability Act—Repealing Acts—Conditions Precedent—Limitation of Actions—Statutes.*—The Federal Judiciary Acts of 1789, U. S. Rev. St., sec. 721, under which the State statutes have been the general rule of limitation as to common-law actions, cannot apply to the later Federal statute known as the Federal Employers' Liability Act, which provides, in effect, by section 6, for the causes therein embraced, action shall be commenced within two years from the day the cause thereof accrued; and this is true whether the restriction of two years be regarded as a statute of limitation or a condition of liability affecting the claimant's right. *Ibid.*

3. *Master and Servant—Employer and Employee—Negligence—Safe Place to Work—Evidence—Nonsuit—Trials.*—Where there is evidence tending to show that an employee was directed by his superior to oil the cups on top of the defendant's compressor every half-hour, requiring him to stand on a ledge 3 or 3½ inches wide, wet with oil, 2 or 2½ feet from the floor, which, according to the blueprint and custom, should have been level with the ground; that the oiling in this manner required him to stand on this ledge, with an oil can in one hand and a funnel in the other, closely between a rapidly revolving 14-foot drive-wheel and rapidly moving piston-rod and shaft; that a guard-rail was customarily used and could have been provided at small expense, which would have prevented the accident; and that the injury complained of was caused by the existing conditions: *Held*, the place provided by the employer is not a safe place to work, as a matter of law; the evidence is sufficient to take the case to the jury upon the issue of defendant's actionable negligence and proximate cause, and a judgment of nonsuit will be set aside on appeal. *Hassell v. Daniels*, 99.

4. *Same— Pleadings— Contributory Negligence — Proximate Cause — Evidence.—Held*, under the evidence of this case, the question of proximate cause was for the jury, and there was no evidence of contributory negligence under the allegations in the answer. *Ibid.*

5. *Master and Servant—Employer and Employee—Safe Place to Work—Negligence—Mines.*—The plaintiff's intestate, a miner in the defend-

MASTER AND SERVANT—*Continued.*

ant's employment, was upon a ladder in defendant's 550-foot shaft, 475 feet from the bottom, and was struck and thrown down to his death by one or more other miners falling upon him. There was evidence tending to show that had the ladder leading down into the mines been properly arranged 100 feet from the bottom, with platforms at certain intervals, with alternating holes through which the ladders leading further below could be reached, the falling of the other employees upon the intestate would have been prevented, and that the platforms above described were ordinarily used in properly constructed mines: *Held*, sufficient to be submitted to the jury upon the question of defendant's actionable negligence and its being the proximate cause of the injury. *Parrish v. Richardson*, 403.

6. *Master and Servant—Employer and Employee—Negligence—Notice—Knowledge—Principal and Agent—Vice-Principal.*—Where there is evidence tending to show that the defendant's negligence in failing to provide platforms in his 550-foot shaft to his mine for a distance of 100 feet from the bottom, and that the death of the plaintiff's intestate, a miner therein, was thereby caused, testimony that the witness told the defendant's underground foreman, three weeks before the injury, that the shaft should be finished by putting in the partitions and platforms, and his reply that he did not have the lumber to finish it is competent to show that the defendant was previously made aware, through his vice-principal, of the dangerous conditions, and fixed him with knowledge thereof, and was not objectionable as being a narrative of a past transaction occurring after the injury. *Southerland v. R. R.*, 106 N. C., 100. cited and distinguished. *Ibid.*

7. *Master and Servant—Employer and Employee—Negligence—Evidence—Questions for Jury—Nonsuit—Trials—Railroads.*—In an action by an employee to recover damages for the alleged negligence of his employer, for an injury received from the derailment of a gasoline car, termed a "speeder," by reason of its defect, while being operated by the defendant at the time in question to carry the plaintiff and other employees to work, there was testimony of defendant's witness tending to show that the car had been worked on a day or two before the injury, because of a defect in the wheel next to the flange; that there was a rough noise while the car was running, caused by the welding made to remedy the defect, until worn smooth; that the axle of the car was crooked just after the injury, and, upon cross-examination, he was uncertain or indefinite as to the condition of the axle at or before the time it occurred: *Held*, apart from the presumption of a negligent defect in the wheel at the time of the injury, the evidence was sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. *Wallace v. Power Co.*, 558.

8. *Master and Servant—Employer and Employee—Negligence—Assumption of Risks.*—An employee does not assume the risks attributable alone to his employer's own negligent breach of the duty he owes to him, or where the injury complained of has not arisen from conditions of an enduring kind, or under circumstances that have afforded him a fair opportunity to have known of these conditions and enabled him to have appreciated the risks and dangers to which he was thereby exposed. *Ibid.*

MASTER AND SERVANT—*Continued.*

9. *Master and Servant—Employer and Employee—Evidence—Contributory Negligence—Trials.*—Where the evidence tends to show that an employee, the plaintiff in the action, was thrown to his injury by a derailment of defendant's gasoline car, or "speeder," under circumstances sufficient to establish the defendant's actionable negligence therein, by reason of a defect in the car or in the wheel near the flange, a suggestion that the plaintiff may have safely jumped from the car as it bumped along the track after the derailment, and that therefore his contributory negligence in not having done so barred his recovery, is untenable. *Ibid.*

10. *Master and Servant—Employer and Employee—Railroads—Gasoline Car—"Speeder"—Standard Track—Derailment—Negligence—Presumption—Burden of Proof—Instructions.*—Where the employer operates a gasoline or "speeder" car over its standard-gauge railroad track, for the purpose of carrying its employees to their work, the rule of liability as to its negligent acts causing injury to one of them, by a derailment of the car, is the same as applicable to roads regularly operated for railroad purposes; and an instruction that if the fact of derailment should be found by the jury, upon the evidence, the burden shifted to the defendant, and that it was required to show from the facts in evidence that the derailment and resultant injury was not due to negligence on its part, is a correct one, when giving the defendant the benefit of its position that the presumption was a rebuttable one. *Ibid.*

11. *Master and Servant—Employer and Employee—Physician—Unskillful Services—Negligence—Consideration—Damages.*—An employer who furnishes medical treatment, when required, to his employees, upon an assessment plan to meet the expenses thereof, is required to exercise due care in the selection of the physician and in continuing him in its service, and, upon its failure to do so, is responsible in damages to an employee caused by his incompetency. *Woody v. Spruce Co.*, 643.

12. *Same—Evidence.*—Where the employer is liable in damages for the unskillful treatment of an incompetent physician it had engaged for its employee, testimony of other physicians that an operation by him was unskillfully performed on an employee entitled to such services, and that the patient thereby suffered injury, tends to prove the incompetency of the physician employed. *Ibid.*

13. *Same—Knowledge—Notice—Inquiry—Assurance.*—Where there is evidence that an employee of defendant had complained to the defendant that a physician the latter had engaged to attend to its employees when in need of medical care was incompetent, and thereafter sues to recover damages for unskillful medical treatment at his hands, under assurance by the employer, at the time, of the competency of the physician: *Held*, evidence sufficient to show that the defendant knew, or was put upon reasonable inquiry, of the incompetency of the physician, and that the employee relied upon the assurance of his employer in submitting to the operation, which he had the right to do. *Ibid.*

MATERIALMEN. See Mechanics' Liens, 1, 2, 3, 4; Railroads, 44; Liens, 1.

MEASURE OF DAMAGES. See Judgments, 11; Parent and Child, 1.

MECHANICS' LIENS. See Sunday, 1.

1. *Mechanics' Liens— Laborers— Materialmen—Notice—Liens—Statutes—Trust Funds—Trusts and Trustees.*—Under the provisions of Revisal, sec. 2021, requiring the contractor to furnish the owner an itemized statement of amounts due by him to laborers, materialmen, etc., which the owner must retain from the amount he owes him, providing also that the laborers and materialmen may themselves give such notice with the same results, thereby securing their "liens and benefits," etc., it is *Held*, that the liens thereby conferred will arise to the claimants for labor done or material furnished, etc., upon sufficient notices properly served, either by the contractor or claimants; and the amounts due by the owner to the contractor at the time of such notice, or which may thereafter be earned under the terms and provisions of the contract, shall constitute a trust fund to be distributed among the lienors. *Holland v. Benevolent Assn.*, 87.

2. *Mechanics' Liens—Laborers—Materialmen—Notice—Liens—Architects.* Notices of claims by laborers, materialmen, etc., for liens upon the building, given to the owner's architect, do not meet the requirements of the statute, without evidence of his further agency, and is insufficient. Rev., sec. 2021. *Ibid.*

3. *Same—Amounts Due.*—The object of the notice required by the statute to be given the owner, and upon which the statutory lien for labor, material, etc., depends, is to apprise the owner of the amounts then due to those who have done labor upon or furnished materials for the building; and a statement of the materials used in the building, given by the contractor to the architect, upon which the former is to be allowed a payment of a certain per cent under the terms of contract, as the building progresses, does not meet the statutory requirements, and is insufficient to create the lien. *Ibid.*

4. *Mechanics' Liens— Laborers— Materialmen— Owner's Knowledge—Notice—Statutes.*—Mere knowledge of the owner that certain laborers are at work on his building, or that certain persons or firms have supplied materials, is insufficient as notice to him, under the statute, of any claim of lien thereon. Rev., sec. 202. *Ibid.*

5. *Mechanics' Liens — Principal and Surety — Contracts — Beneficiaries— Laborers— Subcontractors— Statutes—Municipal Corporations—Cities and Towns.*—Where a town has contracted for sewerage to be done upon its streets, the contractor to pay the laborers and materialmen, with provision for a surety bond for the faithful performance of the contract, including the payment for the labor and materials, etc., and the bond has been given for its faithful performance by the contractor, a subcontractor for the excavation of the trenches with his own machine, for which he furnishes his own oil, etc., at an agreed price per foot, is a laborer and has a lien for work and labor done, within the meaning of the contract and of the statute, and may recover a balance of the contract price upon the bond as a beneficiary thereunder, though not a party thereto or entitled to a lien against the town. Chapter 150, Laws 1913, amended by chapter 9, Extra Session 1913, and chapter 191, Laws 1915. Revisal, secs. 2016, 2019. *Scheflow v. Pierce*, 91.

6. *Mechanics' Liens—Possession—Checks—Payment Stopped—Cash Transactions—Repossession.*—A mechanic ordinarily loses his right of lien

MECHANICS' LIENS—*Continued.*

upon an automobile for the price or value of repairs by surrendering possession to the owner; but where the possession is relinquished by him upon receiving a check for the amount, and drawer having stopped payment of the check, the transaction is upon a cash basis, and the owner may not retain possession of the automobile, so as to deprive the repairer of his mechanic's lien. *Auto Co. v. Rudd*, 497.

MENTAL CAPACITY. See Evidence, 1, 36, 37.

MERGER. See Contracts, 14; Insurance, 1; Deeds and Conveyances, 10.

MERITORIOUS DEFENSE. See Appeal and Error, 1.

MINES. See Master and Servant, 5.

MISREPRESENTATIONS. See Contracts, 37.

MISTAKE. See Contracts, 11.

MORPHINE. See Evidence, 21.

MORTGAGES. See Trusts and Trustees, 6, 8, 9, 12; Actions, 5; Subrogation, 1; Corporations, 1, 3; Husband and Wife, 8.

Mortgages—Lands—Purchase by Mortgagee—Burden of Proof—Evidence—Verdict Directing.—The burden of proof is upon the mortgagee, in his action to recover lands, to show that his purchase from the mortgagor of a part of the lands covered by the mortgage, by other evidence than his deed, was fair, free from oppression, and that he had paid for the land what it was reasonably worth; and where he has failed to introduce such evidence, an answer to the appropriate issue is properly directed in the mortgagor's favor. *Jones v. Williams*, 245.

MOTHER. See Habeas Corpus, 3.

MOTIONS. See Judgments, 1, 2; Appeal and Error, 1, 4, 34, 48; Courts, 1, 8; Dismissal and Nonsuit, 1; Evidence, 23, 25, 38.

MOTIVE. See Homicide, 12.

MOTORMAN. See Railroads, 1.

MULTIPLICITY OF SUITS. See Injunction, 1.

MUNICIPAL CORPORATIONS. See Deeds and Conveyances, 1; Mechanics' Liens, 5; Contracts, 6; Judgments, 7; Bonds, 1.

1. *Municipal Corporations—Cities and Towns—Streets—Offer to Dedicate—Revocation—Acceptance—Deeds and Conveyances.*—Where the owner of lands within the corporate limits of a town has caused the same to be surveyed into streets and lots, and has duly registered the plat thereof, it is an offer of dedication, which is irrevocable after the acceptance by the town, or his conveying the lots accordingly before revocation. *Elizabeth City v. Commander*, 26.

2. *Same—Maps.*—A conveyance of land which the owner has platted into streets and lots, with map duly registered, made subject "to any vested or prescribed rights of the" town and others to a street designated therein, is not a revocation of the offer to dedicate. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

3. *Municipal Corporations—Cities and Towns—Negligence—Street Lights—Hydrants—Discretion.*—While it is the duty of the authorities of an incorporated town to keep its streets and sidewalks in a reasonably safe condition, the placing of street lights and water hydrants are matters left largely to their discretion, and in the absence of its oppression and abuse, no liability attaches for a personal injury thereby caused to a pedestrian. *Rollins v. Winston-Salem*, 411.

4. *Municipal Corporations—Cities and Towns—Negligence—Shade Trees.* Trees along the sidewalk in a town are for a useful purpose and not inconsistent with the object for which streets are made and maintained; and where ample room is left to answer the demands of travel, the city will not be held liable in damages solely because the shadow of a tree cast by an electric street light on a hydrant near the curbing of the sidewalk prevented a pedestrian seeing the hydrant. *Ibid.*

5. *Same—Electric Lights—Shadows—Hydrants—Duty of Pedestrians—Evidence—Nonsuit—Trials.*—Pedestrians upon the sidewalk of a city are required to observe care in looking out for hydrants properly placed near the curbing of the sidewalk, and damages may not be recovered of the town for injuries received from stumbling over one of them so placed within the shadow of a tree cast by an electric street light, in the absence of other evidence tending to show negligence therein on the part of the authorities of the town. *Ibid.*

MURDER. See Homicide, 1, 2, 3, 4, 5, 6, 9.

MUTUAL MISTAKE. See Deeds and Conveyances, 6; Contracts, 37.

NECESSARY EXPENSE. See Constitutional Law 4.

NEGLIGENCE. See Electricity, 1, 2, 3, 4; Appeal and Error, 6; Master and Servant, 3, 5, 6, 7, 8, 9, 10, 11; Railroads, 1, 2, 3, 5, 11, 12, 13, 15, 16, 17, 18, 20; Actions, 3; Damages, 2, 3; Evidence, 6, 22; Verdict, 3; Municipal Corporations, 3, 4; Carriers of Freight, 1, 3; Carriers of Passengers, 4; Criminal Law, 6.

1. *Negligence—Fires—Prima Facie Case—Burden of Proof.*—Where there is evidence tending to show that damage by fire to plaintiff's land had been caused by defendant's engine, a *prima facie* case of negligence is made out, shifting the burden of proof on the defendant to show that the fire was not due to any defective condition of the engine or to any negligence of its employees in its management or operation. *Perry v. Mfg. Co.*, 68.

2. *Negligence—Evidence—Fires—Defective Engines.*—Where there is evidence tending to show that defendant's engine set out fire to the damage of the plaintiff's land, testimony of a witness that he had seen the same engine casting sparks a number of times before the fire started is competent. *Ibid.*

3. *Negligence—Delivery of Coal—Raising Door in Sidewalk—Pedestrians—Streets and Sidewalks.*—The owner of a store in a populous city, to which coal was to be delivered by a dealer, instructed his employee to go into the cellar to unlock the door over a coal hole on the sidewalk where pedestrians were constantly passing. After the employee had done so, and, receiving no answer to his signal to the driver of the

NEGLIGENCE—*Continued.*

coal wagon, who was supposed to open the cellar door and warn pedestrians, he suddenly and without warning of any kind to the plaintiff raised the door and threw her down, causing the injury complained of in the action: *Held*, evidence of actionable negligence on the part of the employee of the store, for which the owner is responsible. *Cole v. Durham*, 289.

4. *Same—Dealer in Coal—Principal and Agent.*—A dealer in coal undertook to deliver it at a store in a populous part of the city, through a coal hole, covered by a door flush in the sidewalk where pedestrians were constantly passing. The city ordinance required that in such instances some one should be stationed to warn the passers-by. There was evidence tending to show that the door was pushed open from beneath by an employee at the store as the plaintiff was passing, causing her, without warning, to fall, to her injury, though the dealer's driver was standing near, whose duty it was to give the warning and to raise the door after it had been unfastened from beneath: *Held*, sufficient to take the case to the jury, upon a motion to nonsuit, of the actionable negligence of the driver in causing the injury, for which the dealer, his principal, would be liable. *Ibid.*

5. *Negligence—Delivery of Coal—Coal Hole—Notice to Pedestrians—Principal and Agent.*—Where an ordinance of the city requires that notice be given to pedestrians that the doors to a coal hole in the sidewalk are about to be opened for the purpose of delivering coal at a store, and the owner of the store is present at the time and depends upon the driver of the delivery wagon to give this notice, whose failure to do so causes an injury to a pedestrian, the negligence of the driver will be imputed to the owner of the store. *Ibid.*

6. *Same—Contributory Negligence—Evidence—Questions for Jury—Trials.* There was evidence in this case tending to show that while the defendant dealer was making delivery of coal at a store, the plaintiff stepped upon the door to the coal hole flush with the sidewalk, and was injured by the door being suddenly and without warning pushed up from beneath by the defendant purchaser's agent, an ordinance of the city requiring that some one, under the circumstances, be placed there to warn the pedestrians; that the defendant's driver was present, in his "business garb," with the delivery team, which, the defendant contended, should have caused the plaintiff to look out for her own safety: *Held*, if this were evidence of contributory negligence on the plaintiff's part, still this question, including that of proximate cause, should be submitted to the jury, and a motion to nonsuit was properly denied. *Ibid.*

7. *Negligence—Joint Tort Feasors—Evidence—Questions for Jury—Trials.* Where, in the delivery of coal by means of a coal hole in a cellar, a pedestrian is injured by stepping upon the floor, flush with the sidewalk, which was suddenly pushed up from beneath without warning and in violation of the city ordinance, and there is evidence of negligence on the part of the coal dealer and of the purchaser of the coal in this respect, the apportionment of the liability between them does not affect the pedestrian's right to recover against them both, as joint tort feasors, and the issue as to their actionable negligence was properly submitted to the jury. *Ibid.*

NEGLIGENCE—*Continued.*

8. *Negligence—Inherent Danger—Independent Contractor—Contracts.*—Where the dealer delivers coal to his purchaser at the latter's store in a populous city, through a coal hole in the sidewalk of one of its principal business streets, where pedestrians are constantly passing, and a pedestrian is injured by stepping upon the door to the coal hole, flush with the sidewalk, which was suddenly and without warning pushed up from beneath contrary to the city ordinance, the delivery of the coal in this manner is so inherently dangerous that the dealer may not escape liability by showing that he had contracted for the delivery of the coal with another, who bore the relation to him of an independent contractor. As to whether such relationship existed, under the evidence in this case, *Quære? Ibid.*

9. *Negligence—Master and Servant—Joint Tort Feasors—Evidence—Instructions—Cities and Towns—Ordinances—Implied Notice.*—Where the evidence tends to show that the plaintiff's intestate was killed in the performance of his duties as conductor on a train, by being struck by lumber piled at a street crossing close to the track by a furniture company, in violation of a city ordinance, in an action against the lumber company and the city: *Held*, sufficient to establish the liability of both defendants as joint tort feasors; and the court having properly instructed the jury upon the questions of proximate cause and primary and secondary liability as between the defendants, their verdict is sustained on appeal. *Ridge v. High Point*, 421.

10. *Negligence—City Ordinances, Violation—Proximate Cause.*—The violation of a city ordinance which produces an injury, while negligence *per se*, may only become actionable when the proximate cause thereof. *Ibid.*

11. *Negligence—Contributory Negligence—Evidence—Questions for Jury.*—Where there is evidence tending to show that the plaintiff's intestate, a conductor on a freight train, was killed through the joint negligence of a furniture company and an incorporated town, by being struck by a pile of lumber left too near the track, while he was attending to his duties, at dark, standing on the step of the car; that he had remarked the day before upon the lumber being dangerously near the track, though the motor car had passed the place safely just before he was killed, and that he did not avail himself of a safe place, reached by ladders, on the top of the car, provided for him to perform the character of work he was engaged in when killed: *Held*, that the credibility of witnesses and other matters were for the jury to determine, upon the question whether he acted under the circumstances as a man of ordinary prudence would have done; and his alleged contributory negligence in not availing himself of a safe place provided by his employer was not, under the particular circumstances shown, one of law to be decided by the court. *Ibid.*

12. *Negligence—Evidence—Nonsuit—Questions for Jury—Trials.*—The evidence tending to show that the plaintiff's intestate, under contract to install the sawmill machinery in defendant's mill and cut his lumber for a certain price per thousand feet, doing the work and furnishing the labor, curved up a key to a pulley, which had theretofore laid with safety along the axle, and, without stopping the swift-running machinery, was soon thereafter caught by the curved end of the key,

NEGLIGENCE—*Continued.*

while he was tightening the pulley, and fatally injured, in the absence of the defendant, of whom the intestate acted independently and without his supervision or control: *Held*, insufficient to take the case to the jury upon the issue of defendant's negligence, or to show that he had failed in the performance of any duty he owed to the intestate; and a motion as of nonsuit upon the evidence should have been granted. *Mullis v. Sanders*, 455.

13. *Negligence—Proximate Cause—Rule.*—The rule that an injury must be the proximate cause of a negligent act of another to be actionable, or a cause that produces the result in continuance sequence, without which it would not have occurred, or which a man of ordinary prudence could have foreseen as probable under existing conditions, does not require that the particular injury complained of in the action should be foreseen, and it is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act. *Hudson v. R. R.*, 480.

14. *Negligence—Federal Employers' Liability Act—Assumption of Risks—Last Clear Chance.*—An employee, under the Federal Employers' Liability Act, only assumes the risks of those defects or dangers that are so obvious that a person of ordinary prudence would have observed and appreciated them, and in applying the doctrine of the last clear chance, under both the State and Federal statutes, the negligence of the plaintiff must be presupposed; hence where the dangers are of such character as to be known only to the defendant, and the negligence producing the injury is that of the defendant, of which the intestate could not have reasonably been aware or have anticipated, the doctrine of the last clear chance is not involved. *Ibid.*

15. *Negligence — Electricity — Primary Liability — Secondary Liability.*—Where the evidence tends only to show that the plaintiff's intestate was killed by a harmless service wire furnished to his employer by an electric power company becoming suddenly charged by a deadly current of electricity from the primary wire of the power company, and that the intestate's employer had only contracted for the use of a wire not dangerous to human life, as between the power company and the employer of the intestate, the question of primary and secondary liability does not arise in an action against them both. *Raulf v. Light Co.*, 692.

NEGOTIABLE INSTRUMENTS. See Partnership, 1; Bills and Notes, 2, 3; Banks and Banking, 1.

Negotiable Instruments—Acceptances—Purchaser—Fraud—Due Course—Vendor and Purchaser—Evidence.—In an action to recover upon an acceptance of which the plaintiff claims to be a holder in due course, and there is evidence to show it was given in the purchase of jewelry by sample, which upon delivery was ascertained to be of very inferior or unmerchantable quality and not according to the sample, and the action is defended upon the ground that the sales agent had perpetrated a fraud therein upon the acceptor of the paper: *Held*, the burden was upon the plaintiff to show that he was a purchaser in due course, before maturity, in good faith, for value, without notice of the infirmity of the instrument, etc. (Revisal, secs. 2201, 2208); and evidence of the defendant as to its price, inferior quality, or that it was

NEGOTIABLE INSTRUMENTS—*Continued.*

not up to the standard and had been refused by his customers, etc., is competent. *Discount Co. v. Baker*, 546.

NEWLY DISCOVERED EVIDENCE. See New Trials, 1; Appeal and Error, 29; Courts, 8.

NEW MATTER. See Evidence, 18.

NEW TRIALS. See Appeal and Error, 14, 29, 30.

1. *New Trials — Court's Discretion — Newly Discovered Evidence — Additional Issues.*—Where the plaintiff's evidence discloses an additional and complete defense, not embraced by the pleadings or issues, and a verdict has been rendered on issues agreed upon, and it appears that the defendant was not previously aware of the evidence thus revealed, but was taken by surprise when it was disclosed, it is within the sound legal discretion of the trial judge to retain the issues and their answer of one in the plaintiff's behalf, and grant a new trial to the defendant on the issue arising from the evidence thus newly discovered, leaving the question of damages open. *Stanford v. Junior Order*, 443.

2. *New Trials — Pleadings — Amendments.*—Where the evidence of the plaintiff shows a complete defense not embraced by the pleadings or covered by the issues submitted to the jury, and the trial judge, after verdict, orders another trial and a new issue based upon the additional evidence, it is, in effect, permitting the defendant to amend his answer and present the new question, which should be done before the new trial is entered upon. *Ibid.*

3. *New Trials — Court's Discretion — Insurance — Evidence.*—Where an issue as to whether the death of the insured was caused by the excessive use of intoxicating liquors is a defense to an action on the policy, under its terms, and it appears upon the trial, from the plaintiff's evidence, that his death was caused by valvular disease of the heart, appearing before his acceptance as a risk, which is also a complete defense under the policy contract, and that the defendant was not previously aware thereof, it is within the reasonable discretion of the trial judge, after verdict, to retain the issue answered in the plaintiff's favor, and to submit alone, on the question of the defendant's liability, an issue as to the new or additional defense, reserving the question as to damages. *Ibid.*

NO-FENCE LAW. See Statutes, 7, 8, 9.

NONSUIT. See Actions, 2, 7; Master and Servant, 3, 7; Evidence, 4, 11, 22, 29, 30, 37, 38; Railroads, 3, 11; Municipal Corporations, 5; Deeds and Conveyances, 6; Negligence, 12; Limitation of Actions, 4; Principal and Agent, 8, 18; Statute of Limitations, 1; Appeal and Error, 48; Criminal Law, 7.

NOTICE. See Judgments, 2; Mechanics' Liens, 1, 2, 4; Carriers of Freight, 1; Appeal and Error, 13; Drainage Districts, 1, 4, 8; Trusts and Trustees, 14, 16; Elections, 13; Homicide, 3; Contracts, 40; Carriers of Passengers, 2; Master and Servant, 6, 13; Negligence, 9; Railroads, 14; Liens, 1; Evidence, 20.

NOTICE TO PEDESTRIANS. See Negligence, 5.

NUISANCE. See Judgments, 27.

1. *Nuisance—Automobiles—Garage—Gasoline.*—The general use of automobiles for business and pleasure make public garages and supply stations for gasoline, etc., an essential, and their establishment and maintenance are not nuisances *per se*. *Hanes v. Carolina Cadillac Co.*, 350.

2. *Same—Injunction.*—In this case the court properly dissolved an order restraining the defendant from maintaining a garage and supply station for furnishing gasoline, etc., to the public at a place near the plaintiff's residence, the fact that it was a nuisance not having been established by a verdict of the jury, and the conditions under which it may be maintained as set forth in the judgment are held sufficient to safeguard the plaintiff's rights. *Ibid.*

OATHS. See Elections, 4, 8.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 4, 11, 21, 22, 31, 32, 34, 40, 41, 43, 55, 58, 59, 60; Courts, 1; Evidence, 25; Instructions, 2, 9.

OFFENSE. See Statutes, 11; Criminal Law, 9.

OFFER. See Contracts, 1, 3, 5.

OFFICERS. See Corporations, 5.

OPINIONS. See Appeal and Error, 13, 15; Contracts, 11; Evidence, 7, 10, 16, 24, 36, 46; Jurisdiction, 1.

OPTION. See Trusts and Trustees, 7; Principal and Agent, 10, 12; Contracts, 32, 33, 34, 35.

ORDERS. See Railroads, 19.

ORDINANCE. See Railroads, 1; Contracts, 6; Negligence, 9.

OUSTER. See Trusts and Trustees, 4; Deeds and Conveyances, 7.

PARENTS. See Habeas Corpus, 1, 2, 4, 5; Parties, 1; Evidence, 35, 37.

PARENT AND CHILD.

1. *Parent and Child—Seduction of Child—Rape of Child—Loss of Services—Measure of Damages—Mental Anguish.*—The recovery of damages allowed the father against one who has debauched his daughter grows out of the relationship of master and servant for loss of services; but in the relationship of father, he may recover for mental suffering and anguish caused by his humiliation and sense of dishonor and for expenses incurred, and also punitive damages. *Tillotson v. Currin*, 479.

2. *Parent and Child—Rape of Child—Seduction of Child—Age—Parties—Constitutional Law—Feigned Issues—Statutes.*—Damages may be recovered by the father against one who has debauched his daughter under twenty-one years of age, but if over that age she must sue in her own right under the provisions of our Constitution abolishing feigned issues and our statute requiring that actions be brought by the real party in interest. Revisal, sec. 400. *Ibid.*

3. *Parent and Child—Rape of Child—Seduction of Child—Age—Burden of Proof—Trials.*—The right of action of the father against one who has debauched his daughter depending upon whether or not she had

PARENT AND CHILD—*Continued.*

reached the age of twenty-one, and also this fact being peculiarly within his own knowledge, the burden is on him to show that at the time in question she was under age. *Ibid.*

4. *Parent and Child—Seduction of Child—Rape—Force—Loss of Services—Actions.*—It is not necessary to the father's action against one who has debauched his daughter under the age of twenty-one that the intercourse should have been induced by the defendant's solicitation, force being in aggravation of the damages allowed; and upon the birth of a child in consequence, the loss of her services will be presumed. *Ibid.*

5. *Parent and Child—Contract—Services Rendered—Implied Promise to Pay—Son-in-Law.*—Services rendered by a child to his parent while living as a member of the family, including the relationship of son-in-law, are presumed to be gratuitous, and no recovery can be had therefor, in the absence of an express contract, when nothing appears except the relationship and the performance of the services; but, under certain circumstances, the jury may find as a fact an intent on the one part to charge and on the other to pay for the services rendered, whereupon the law will imply a contract to pay for their reasonable value. *Ellis v. Cox*, 616.

6. *Same—Reference—Findings—Evidence—Intent.*—Where, upon the evidence, a referee has found as a fact that services rendered to a father by his daughter and her husband while living with him as members of his family were rendered and received in such manner and under such circumstances as created an implied contract to pay what they were reasonably worth: *Held*, the finding is sufficient and will be upheld; and the intent, though not appreciable to the senses, or announced, may be inferred from the circumstances; and the evidence thereof, in this case, is held to be sufficient. *Ibid.*

PAROL AGREEMENT. See Insurance, 4; Contracts, 16, 26, 27; Sales, 2.

PAROL EVIDENCE. See Insurance, 7; Appeal and Error, 3; Contracts, 28.

PAROL TRUSTS. See Pleadings, 2; Trusts, 1; Trusts and Trustees, 6, 8.

PARTIES. See Malicious Prosecution, 1; Appeal and Error, 2; Evidence, 1, 12; Wills, 1; Actions, 3; Judgments, 18.

Parties—Parent and Child—Son-in-Law—Contracts—Assignment of Right—Judgments.—Where the daughter and son-in-law have a valid claim against the father for services rendered him while living as a member of his family, and the daughter assigns her claim to her husband, who sues alone, though his recovery is sustained, yet she should have become a party to the action, in order that she may be bound by the judgment. *Ellis v. Cox*, 616.

PARTITION. See Tenants in Common, 1, 2, 3.

1. *Partition—Heirs at Law—Denial of Title—Evidence of Title—Dower—Judgment Roll.*—Where proceedings to partition lands of the deceased father are brought by his children and heirs at law, and one of them denies the title to have been in the father, but claims it adversely in

PARTITION—*Continued.*

himself, and the cause has been transferred and is being tried in the Superior Court, the judgment roll in the proceedings for dower theretofore terminated is competent as a *quasi* admission, or evidence, in contradiction of the adverse claim, when it therein appears that the widow alleged title in the deceased, which was not denied by the present adverse claimant, though a party to the proceedings. *Riddle v. Riddle*, 485.

2. *Same—Adverse Possession.*—Where in proceedings to partition lands among the children and heirs at law of the deceased father one of them denies the source of title and claims it adversely in himself, the judgment roll in the petition for dower alleging title in the deceased, and the widow's possession thereunder, is competent as evidence to show the character of the widow's possession, which may be tacked to the possession of her husband when sufficient with the other evidence of adverse possession to perfect the title in the heirs. *Ibid.*

PARTNERSHIP. See Statutes, 2, 3, 4; Deeds and Conveyances, 4.

1. *Partnership—Negotiable Instruments—Seal—Limitation of Actions.*—A promissory note, signed by one of a partnership, with a seal after his own name, in behalf of the firm, or as purchasing agent for the others, is a simple contract as to the other partners, though a contract under seal as to the one thus signing, and is barred as to the others by the three-year statute of limitations. *Supply Co. v. Windley*, 18.

2. *Same—Ratification—Knowledge.*—In order for members of a partnership to subsequently ratify the action of one of them in giving the firm's note under seal, and repel the bar of the three-year statute of limitations, it is necessary to show that the acts relied on were with knowledge that the instrument was under seal. *Ibid.*

3. *Same—Evidence—Trials.*—A note under seal is not necessary to secure a lien for agricultural advances; and where the evidence tends only to show a partnership for farming purposes, and that one of the partners gave the firm's note under seal, and the other farmed and applied the proceeds towards the payment of the note, it is not sufficient to show that the other partner acted with knowledge that the note was under seal, and repel the bar of the three-year statute of limitations as to him. *Ibid.*

4. *Partnership — Principal and Agent — Contracts — Intent — Estoppel.*—Where the partnership relation of a firm for a certain year has been established (see *Machine Co. v. Morrow*, 174 N. C., 198), the acts of one of the partners during that term, within the scope and exegencies of the current business, is binding upon the other; and where labor has accordingly been done for the partnership and money lent thereto by an employee, under agreement with the partner in charge of the business, the existing contract of partnership will control, and the mere knowledge of such employee at the time that the other partner intended to withdraw from the firm, without any element of estoppel, will not release the partner so intending from liability. *Oakley v. Morrow*, 134.

5. *Partnership—"Assumed Name"—Statutes.*—Where a partnership business is being conducted under the surname of the proprietors in such manner as to afford a reasonable and sufficient guide to a correct

PARTNERSHIP—*Continued.*

knowledge of the individuals composing the firm, chapter 77, Laws 1913, forbidding the carrying on or transacting business under an "assumed name," etc., does not apply. *Jennette Bros. Co. v. Coppersmith, ante*, cited as controlling. *Befarah v. Spell*, 193.

PATERNITY. See Seduction, 3.

PATHWAYS. See Easements, 1.

PAYMENT. See Trusts and Trustees, 15; Insurance, Fire, 2; Sales, 3; Principal and Agent, 15, 16; Contracts, 42.

PEDESTRIANS. See Negligence, 3; Municipal Corporations, 5.

PENAL STATUTES. See Statutes, 12.

PENALTY. See Commerce, 1; Contracts, 30.

PENSIONS.

Pensions—Confederate Soldiers—Burial Expenses—Charge Upon County—Statutes.—Revisal, sec. 5005a, requires the $20 on account of the burial of a Confederate pensioner to be paid by the board of commissioners of the county on the pension roll of which his name appears, irrespective of residence. The delay in the prosecution of this case unfavorably commented on. *Hannah v. Comrs.*, 395.

PER CAPITA. See Estates, 2.

PERJURY.

Perjury— Contempt— Contracts, Immoral— Public Policy— Criminal Law. Where the plaintiff's evidence would establish the fact that the defendant, a physician, had given testimony in an action of his deceased intestate upon consideration of his giving favorable expert testimony on the measure of damages, which the defendant in the present action has denied, and the jury have found upon allegation and evidence that the defendant had entered into the contract knowingly and designedly, and had collected the consideration named: *Held*, the defendant, upon the verdict, was guilty of gross contempt of court, with recommendation to the solicitor to consider a bill of indictment charging perjury as to the defendant's testimony in the former action. *Davis v. Smoot*, 538.

PERSONAL PROPERTY. See Sales, 3; Principal and Agent, 6; Wills, 8.

PETITION. See Supersedeas, 2; Appeal and Error, 15.

PHYSICIANS. See Contracts, 24; Master and Servant, 11.

PLATFORM. See Carriers of Passengers, 2.

PLEADINGS. See Witnesses, 1; Master and Servant, 4; Judgments, 8, 9, 25, 26; Justices of the Peace, 2; Trusts and Trustees, 8; Ejectment, 1; Evidence, 5; Railroads, 8; Limitation of Actions, 1; Slander, 1; New Trials, 2; Statutes of Fraud, 1; Contracts, 31, 37, 38.

1. *Pleadings—Assumption of Risks.*—The doctrine of assumption of risks must be pleaded to make this defense available. *Hassell v. Daniels*, 99.

PLEADINGS—*Continued.*

2. *Pleadings—Evidence—Variance—Trusts—Parol Trusts—Principal and Agent.*—Where the complaint in a suit to engraft a parol trust upon the legal title of a purchaser at a mortgage sale of land sufficiently alleges that the land belonged to the wife, and that the negotiations resulting in the trust were made by the husband with such purchaser, acting as his wife's agent, evidence of the transactions so made in the wife's behalf is not variance with the pleadings and objectionable on the ground of a fatal variance between the allegation and the proof. *Williams v. Honeycutt*, 102.

3. *Same—Judgments.*—Where the wife has commenced suit to engraft a parol trust in her favor on the title of a purchaser at a mortgage sale of her lands, and it appears that the agreement was made between the purchaser and her husband as her agent, and the wife has since died and the action maintained by her husband and heirs at law: *Held*, the fact of the husband's agency is immaterial, as the judgment in plaintiff's favor will bind the parties. *Ibid.*

4. *Pleadings—Evidence—Variation—Railroads—Sleeping Cars, Pullman—Appeal and Error—Prejudicial Error.*—Where there is general allegation and evidence that the plaintiff was made sick, etc., by the failure of the defendant railroad company to provide sleeping-car accommodations between Washington and Richmond, on transportation to a town in this State, for which its agent at Baltimore had issued a Pullman ticket, it is reversible error for the trial judge in this State, without amendment of pleadings, to reopen the case after the close of the evidence, and allow further evidence to be introduced in plaintiff's behalf tending to show that the station agent in Baltimore refused to allow the plaintiff to take an earlier train from Baltimore, which would have put him in Washington in time to make connection with the train on which his reservation had been made and which had left before his arrival there, the effect being to substitute a new cause of action for that alleged, and to the defendant's substantial prejudice. *Sultan v. R. R.*, 136.

5. *Pleadings — Admissions — Information and Belief.*—Admissions in the answer as to matters alleged on information and belief in the complaint are admissions of the matters so alleged, and not confined to the fact that the defendant has been so informed and believes them. *Williams v. Lumber Co.*, 175.

6. *Pleadings—Admissions—Lands—Divisional Lines—Lappage—Adverse Possession—Title.*—Pleadings will be liberally construed; and where the plaintiff has alleged the line of his senior grant as the true one in dispute between his own lands and those of the defendant adjoining them, and the answer alleges there is no lappage of that line with the line given in his junior grant; and, further, that he owns the land on both sides of that line, he is not confined by his pleadings to the location of the line described in plaintiff's grant, but may show title, by adverse possession, to the *locus in quo* beyond. *Parker v. Parker*, 198.

7. *Pleadings — Defense — Counterclaim — Judgment.*—In an action to recover a balance of the purchase price of lands, allegations in the complaint that the lands were sold as a known tract at a certain price for the whole, which was denied by the answer, alleging the price was by the acre, overpayment, and claiming the amount thereof: *Held*, the

PLEADINGS—*Continued.*

matters alleged in the answer were those in defense, not requiring a replication in denial, and motion for judgment upon the pleadings for a counterclaim because not denied, or a requested instruction to that effect, was properly refused. *Galloway v. Goolsby*, 635.

PLEAS. See Executors and Administrators, 1, 3.

PLEAS IN BAR. See Reference, 1.

POLICE REGULATIONS. See Drainage Districts, 7.

POLICIES. See Insurance, 6, 10, 12, 14; Appeal and Error, 46; Insurance, Fire, 4, 6, 7.

POLL-HOLDERS. See Road Districts, 4.

POLL TAX. See Elections, 11.

POSSESSION. See Actions, 4; Mechanics' Liens, 6.

PREJUDICE. See Appeal and Error, 7, 36; Railroads, 4.

PRESENCE. See Witnesses, 2.

PRESENTMENT FOR PAYMENT. See Bonds, 1.

PRESUMPTIONS. See Appeal and Error, 18; Elections, 6; Taxation, 2; Statutes, 6; Master and Servant, 10; Homicide, 6, 10; Criminal Law, 3.

PRIMARIES. See Elections, 1.

PRINCIPAL AND AGENT. See Insurance, 6, 8, 10, 11, 12; Pleadings, 2; Judgments, 7; Partnerships, 4; Contracts, 10; Negligence, 4, 5; Deeds and Conveyances, 4; Master and Servant, 6; Evidence, 14; Taxation, 4; Corporations, 5; Bonds, 2; Insurance, Fire, 4.

1. *Principal and Agent—Undisclosed Principal—Contracts—Actions.*—It is unnecessary that the name of a principal be disclosed for him to maintain an action on a contract made by his agent in his behalf. *Williams v. Honeycutt*, 102.

2. *Principal and Agent—Respondeat Superior—Contracts—Torts—Damages—Corporations.*—Where there is evidence tending to show that the tort complained of was committed by a corporation under contract with the defendant corporation, and while the work was under the management or control of an officer of them both, the acts and knowledge of such officer in respect to the facts and circumstances under which the tort had been committed will be imputed to the defendant, his principal, as its own, under the principle of *qui facit per alium facit per se*. *Williams v. Lumber Co.*, 175.

3. *Same—Fires.*—Where a corporation, as grantee of defendant corporation of certain timber, has negligently set out fires to the lands of the plaintiff, the defendant's grantor, by the operation of its engines used in cutting the timber, under the charge of an officer of both corporations, the acts of the officer for both corporations will be imputed to the defendant. *Ibid.*

PRINCIPAL AND AGENT—*Continued.*

4. *Principal and Agent—Limitation of Actions—Demand and Refusal.*—The right of action of a principal against his general agent begins to run from his demand and refusal, or from the death of the agent. *Gooch v. Bank*, 213.

5. *Same—Husband and Wife—Wife's Separate Property.*—Where the husband has acted as the general agent of his wife to invest and reinvest her separate property, or moneys belonging to her separate estate, according to his own judgment, and the husband has died, and there is no evidence of a demand on her part for the property or investments so made, or his refusal thereof, the agency ceased by operation of the law, at his death, and the statute of limitation will only begin to run from that time. *Ibid.*

6. *Same—Personalty—Jus Accrecindi.*—Where the husband, acting as the general agent of his wife, has invested her separate personality in certain shares of stock, having had them issued to himself and wife, the shares remain the separate property of the wife, and the question of the right of survivorship in personalty between husband and wife does not arise. This question discussed by CLARK, C. J. *Ibid.*

7. *Principal and Agent—Declarations—Evidence—Carriers of Passengers—Brakeman.*—In an action for damages for sickness caused by the car of defendant railroad company not being properly heated in cold weather, declarations of a brakeman to the plaintiff, before entering the car as a passenger, as to the breaking of the heating pipe and the cold condition of the car, are incompetent as declarations of an agent which bind his principal. *Plummer v. R. R.*, 279.

8. *Principal and Agent—Evidence—Nonsuit—Questions for Jury—Trials—Automobiles.*—In this action against the owner of an automobile to recover damages for an injury caused by the negligent driving of his son, the evidence tending to show that the son was driving his mother, the defendant's wife, at the time; that he usually did this, to the knowledge of the defendant, whose consent was not necessary to be procured; and it is *Held*, with the other evidence appearing in the record and passed upon on the former appeal, that it was sufficient to take the case to the jury upon the defendant's liability, as principal, for the negligence of his son; and defendant's motion to nonsuit should have been denied. *Clark v. Sweaney*, 529.

9. *Principal and Agent—Scope of Authority—Evidence—Duplicate Writing.*—A duplicate of an original written authority to an agent to act in respect of the matters in controversy, though unsigned by the principal, is competent as evidence of the authority therein conferred where it appears that the principal had prepared the original and duplicate, signed and retained the former and returned the duplicate to his agent, for in thus acting the principal becomes a party to the transaction to the same extent as if he had signed the duplicate. *Oliver v. Fidelity Co.*, 598.

10. *Same—Contracts—Agreements—Statute of Limitations—Principal and Surety — Litigation — Interests.*—A general agent, without respect to the usual scope of such agencies, may bind his principal by an act he was specially authorized to do; and where a general agent of a surety company has induced a ward to forego suing his principal, a surety

PRINCIPAL AND AGENT—*Continued.*

on a guardian bond, until certain litigation had terminated, bearing directly upon the extent of his principal's liability, under promise not to plead the statute of limitations, and there is evidence that the agent was authorized by his principal to act in that litigation for it, both as agent and attorney at law, it is sufficient to be submitted to the jury, upon the question whether the agent's agreement not to plead the statute of limitations was within the direct authority given him by his principal, the surety company. *Ibid.*

11. *Principal and Agent—Bills and Notes—Delay in Presentment—Agent's Liability.*—Where an agent has incurred a personal liability on negotiable instruments given in behalf of his principal, he may not avoid payment on the ground of delay in presenting them for payment when it was caused at his own request and by his own conduct. *Caldwell County v. George,* 603.

12. *Same—Evidence—Correspondence.*—Where an agent seeks to avoid liability on notes he has given in his principal's behalf, whereon he is personally liable, on the ground of delay in presenting them, and there is evidence that this delay was occasioned by his own request and conduct, his correspondence with the payee bearing directly upon the question is competent against him in an action to recover upon the notes. *Ibid.*

13. *Principal and Agent— Evidence— Declarations— Letters.*—A letter may not be received as evidence of the writer's agency to act for another, for statements therein of this character are mere declarations by the supposed agent, the truth of which has not been supported by the oath of the witness and cross-examination. *Arndt v. Ins. Co.,* 652.

14. *Principal and Agent— Evidence— Declarations— Hearsay.*—Declaration of a third and disinterested person, having no authority to speak for the principal, are incompetent to prove agency. *Ibid.*

15. *Principal and Agent— Fraud— Evidence— Insurance— Payment of Premium.*—In an action to recover the premiums paid on a life insurance policy, upon the ground of fraudulent representations by the defendant's agent in its procurement, it is competent, upon cross-examination of the plaintiff, to show that he had received a letter from the defendant stating the correct conditions under which it had been issued, together with the fact that he had thereafter paid the annual premium on the policy. *Ibid.*

16. *Principal and Agent— Fraud— Insurance Policy— Payment— Laches— Limitation of Actions.*—Where the insured claims that he had been induced by the fraudulent misrepresentation of the insurer's agent, as to the paid-up value of the policy, to accept it, and he, though able to read and write, and with full and free opportunity to inform himself of the true facts, plainly expressed upon the face of the policy, kept the insurance in force for nine years: *Held,* he is barred by his own laches and the three-year statute of limitations, after the discovery of the alleged fraud, from avoiding the policy and recovering the premiums thereon. *Ibid.*

17. *Principal and Agent — Declarations — Evidence.*—Neither the fact of agency nor the extent of the supposed agent's authority can be proved by his declarations alone. *Adams v. Foy,* 695.

PRINCIPAL AND AGENT—*Continued.*

18. *Same—Salesman—Automobiles—Nonsuit—Trials.*—Testimony that on a former occasion one representing himself to be defendant's agent tried to sell the witness an automobile, and at the time of the admitted negligence, while driving defendant's automobile from one of defendant's garages to another in a different town, he had renewed his efforts to sell the car of the defendant, which he was driving, and defendant's admission of liability when the supposed agent was engaged for him in the capacity of salesman, is sufficient for the determination of the jury upon the question, and a judgment as of nonsuit upon the evidence is properly refused. *Ibid.*

PRINCIPAL AND SURETY. See Mechanics' Liens, 5; Principal and Agent, 10.

PRISONER. See Evidence, 39.

PRIVIES. See Limitation of Actions, 3.

PROBATE. See Husband and Wife, 2, 10, 11, 14; Wills, 5, 6, 7.

PROBATE JUDGE. See Clerks of Court, 2.

PROCEEDINGS IN REM. See Drainage Districts, 4.

PROMISE. See Insurance, 4.

PROMISE OF MARRIAGE. See Seduction, 2, 3, 4, 5, 6, 7.

PROOF OF LOSS. See Insurance, Fire, 1, 6.

PROPERTY. See Animals, 1.

PROSECUTRIX. See Seduction, 7.

PROTEST. See State's Lands, 1; Appeal and Error, 10, 12.

PROXIMATE CAUSE. See Master and Servant, 4; Railroads, 1, 11, 15; Carriers of Passengers, 3; Negligence, 10, 13.

PUBLICATION. See Drainage Districts, 1.

PUBLIC INTERESTS. See Contracts, 17.

PUBLIC POLICY. See Statutes, 9; Injunction, 2; Contracts, 24; Perjury, 1.

PULLMAN. See Railroads, 3; Pleadings, 4.

PUNCTUATION. See Contracts, 3.

PURCHASE. See Husband and Wife, 9.

PURCHASE PRICE. See Contracts, 34.

PURCHASER FOR VALUE. See Register of Deeds.

PURCHASERS. See Trusts and Trustees, 6, 9; Mortgages, 1; Taxation, 1; Negotiable Instruments, 1.

QUALIFICATIONS. See Elections, 4, 7, 9.

QUESTIONS AND ANSWERS. See Appeal and Error, 41, 62, 64.

QUESTIONS FOR JURY. See Electricity, 13; Executors and Administrators, 2; Betterments, 1; Contracts, 7, 9; Subrogation, 1; Evidence, 7, 15, 17, 22, 37, 49; Negligence, 6, 7, 11, 12; Railroads, 11, 15; Elections, 9; Incest, 1; Deeds and Conveyances, 6; Limitation of Actions; Principal and Agent, 8; Master and Tenant, 7; Instructions, 8.

RAILROADS. See Damages, 1, 2; Pleadings, 4; Verdict, 3; Carriers of Freight; Carriers of Passengers; Master and Servant, 7, 10.

1. *Railroads—Crossings—Street Cars—Motormen—Negligence—Contributory Negligence—Proximate Cause—Speed Ordinance.*—In an action to recover damages of a railroad company for a personal injury to plaintiff, temporarily acting for a motorman, at his request, in running a street car approaching a railroad crossing, there was evidence tending to show that the street car was very slowly moving towards the railroad track, and that the defendant's train, hidden by an obstruction, was exceeding the speed ordinance of the town and moving backwards without signal or proper lookout, ran upon the street car, just entering upon the railroad track, and injured the plaintiff. *Held*, sufficient to take the case to the jury upon the issue of defendant's actionable negligence, and as to whether the plaintiff was guilty of contributory negligence in acting without taking a reasonable and proper observation as to the danger, or whether he should have stopped the street car, in the exercise of reasonable care, before going upon the crossing. The judge left the question of proximate cause to the jury under a proper charge. *Dail v. R. R.*, 111.

2. *Railroads—Street Railways—Crossings—Negligence—Contracts—Evidence.*—A contract between a street car company and a railroad company requiring that the cars of the former should come to a full stop a distance of fifty feet before reaching a railroad crossing, is no defense to an action against the railroad company brought by one operating the car, to recover for an injury alleged to have been caused by the train negligently running upon the car, when the plaintiff had no knowledge thereof and was not a party thereto; and the contract is properly excluded from the evidence. *Ibid*

3. *Railroads—Negligence—Evidence—Sleeping Cars, Pullman—Nonsuit—Trials.*—Where it is alleged, and plaintiff's evidence tends to show, that the damages sought in an action against a railroad company was caused by the defendant's failure to furnish sleeping-car accommodation, a ticket for which the plaintiff had bought and paid the defendant's proper agent, a motion for judgment as of nonsuit is properly denied. *Sultan v. R. R.*, 136.

4. *Railroads—Condemnation—Easements—Rights of Way—Deeds and Conveyances—Charter Width.*—A conveyance of so much of the owner's land as may be taken in making a connection with another railroad, within the city's limits, according to a certain survey, is not *ipso facto* a conveyance of the full width thereof authorized by its charter; and where a railroad company acquired by deed a less width of land as a right of way than that authorized by its charter, it can only take more of the land by condemnation with compensation, in the absence of further contract. *Tighe v. R. R.*, 239.

5. *Railroads—Federal Employers' Liability Act—Statutes—Fellow-Servants—Negligence—Assumption of Risks.*—While at common law the negligence of a fellow-servant was classed among the risks assumed

RAILROADS—*Continued.*

by an employee engaged in a common service, and an engineer and brakeman on a railroad train come within this classification, the doctrine is controlled by the Federal Employers' Liability Act in cases coming within its intent and meaning; and while section 4 of the act in question recognizes the assumption of risks as a defense in certain instances, section 1 withdraws from the class of assumed risks cases of unusual and instant negligence of a fellow-servant, under circumstances which afford the injured employee no opportunity to know of the conditions or appreciate the attendant dangers, and therein the employer is responsible in damages for the negligence of the employee which caused the injury. *Jones v. R. R.*, 260.

6. *Same—Personalty—Jus Accrescindi.*—Where the husband, acting as the train, under the Federal Employer's Liability Act, does not assume the risks of the sudden, unusual and unnecessary stopping of the train by the engineer thereof while making a flying switch which, without warning, caused the injury complained of in the action. *Ibid.*

7. *Railroads—Federal Employers' Liability Act—Instructions—Assumption of Risks—Appeal and Error—Harmless Error.*—The general definition of the doctrine of assumption of risks, under the evidence in this case, that if the defendant railroad company was accustomed to make these flying switches and the plaintiff to assist in them, he assumed the risks of the incidental dangers, was correct, according to the Federal Employers' Liability Act, taken in connection with the instructions on the evidence as to risks not assumed by the employee, but if erroneous was without appreciable significance and will not affect the result. *Ibid.*

8. *Railroads—Employer and Employee—Federal Employers' Liability Act—Pleadings—Amendments—New Cause of Action—Omissions—Answer—Aider—Trials.*—Where the plaintiff, an employee of a railroad company, was injured while at work on a car used in immediate connection with interstate commerce, and has brought his action in time, alleging this fact in general terms, and the defendant has answered, denying negligence, but also alleging with definiteness and particularity that the rights and liabilities of the parties were controlled by the Federal Employers' Liability Act, setting up defenses thereunder, and accordingly, without objection, the issues applicable have been submitted to the jury, with supporting evidence: *Held*, the cause coming within the provisions of the Federal act, it was not objectionable, at the close of the evidence, for the trial court to permit the plaintiff to amend his complaint by definitely alleging the statute in question, making definite averment as to the facts which brought his case within its terms and under its control, the amendment being only a formal statement of conditions already created by the parties, and about which there was no dispute; and, further, the answer, filed within the stated period, cured any omission in the complaint, under the doctrine of "aider," by its additional and supplemental averments. *Cole v. Durham*, 301.

9. *Same—Demurrer—Limitation of Actions.*—Where an action, brought by an employee against a railroad company, has been tried under evidence and issues within the intent and meaning of the Federal Employers' Liability Act, and the complaint has omitted to set forth facts with sufficient definiteness to bring the cause within its terms, and in

RAILROADS—*Continued.*

reply the answer has sufficiently done so, the action is not demurrable on the ground that the plaintiff was permitted to amend his complaint more than two years after the cause accrued, and therefore barred under the terms of the statute in question, in that it alleged a new cause of action: first, the parties having elected to treat the action as being within the provisions of the statute, a change of front is not permissible; and, second, the omission in the complaint to allege the fact of interstate commerce is aided or cured by the full averments in the answer in that respect. *Ibid.*

10. *Railroads—Federal Employers' Liability Act—Damages—Loss of Mental Powers.*—Where a defendant railroad is liable in damages for an injury negligently inflicted and coming within the provisions of the Federal Employers' Liability Act, the loss of the employee's mental powers is also an element of the damages recoverable, if supported by sufficient evidence. *Ibid.*

11. *Railroads—Negligence—Evidence—Cars at Grade—Proximate Cause—Questions for Jury—Nonsuit.*—Where the evidence tends to show that the defendant railroad company left its cars on a siding where it knew children were in the habit of playing, unlocked and insecurely blocked to prevent their rolling down a steep grade; and several children, on the occasion complained of, unlocked the cars, which ran down the grade and struck and injured plaintiff's team while being loaded according to his custom, of which the defendant had knowledge; that the defendant had failed to provide a derailer, which would have avoided the injury, and its cars, so placed, had on other occasions ran down this grade, causing damage under like circumstances: *Held*, sufficient to show defendant's actionable negligence, and its proximate cause of the injury, to take the case to the jury. *Mirror Co. v. R. R.*, 397.

12. *Same—Intervening Negligence.*—Where cars negligently left by defendant railroad company at a down grade have been set in motion by children accustomed to play there, and cause damage to the plaintiff's property, the defense of intervening negligence is not available. *Ibid.*

13. *Railroads—Negligence—Third Persons—Concurring Causes—Actions.* Where defendant railroad company's negligence concurs with that of another in setting cars left at a down-grade in motion, to the plaintiff's injury, the concurrent act of the other party will not relieve the defendant of liability. *Ibid.*

14. *Railroads—Liens—Materialmen—Statutes—Interpretation—Notice—Limitation of Action.*—Revisal, sec. 2021, is not repealed by chapter 150, Laws 1913, the later act expressly purporting to be an amendment, and there is no conflict between the two acts that will fall within section 9, Laws 1913, repealing all acts in conflict therewith; nor between section 2021 of the Revisal, and section 2018 as amended, it being the legislative intent to extend their provisions to those who furnish materials to the subcontractors of railroads; and, construing the above sections in connection with section 2028 as amended, the furnisher of materials to the contractor on an entire contract may file his itemized statement with the railroad company within six months after its completion, and maintain his action to enforce his lien, when

RAILROADS—*Continued.*

commenced within six months thereafter. Revisal, sec. 2027. *Powder Co. v. Denton*, 427.

15. *Railroads — Negligence — Evidence — Proximate Cause — Questions for Jury — Master and Servant — Employer and Employee.*—In an action brought to recover damages of a railroad company for negligently causing the death of plaintiff's intestate there was evidence tending to show that in the course of his employment the intestate was carrying mail from one of defendant's trains to another, on parallel tracks, across an intervening track, as he was accustomed to do, at the time one of the trains was changing locomotives, and that the old engine, or the one to be left, was enveloped from the intestate's sight by steam from its cylinders, and that this engine, so obscured, backed upon the intestate, contrary to defendant's general order, without signal or warning, or lookout upon the rear of the engine, to warn pedestrians accustomed to pass there of its approach, which would have avoided the injury: *Held*, sufficient for the determination of the jury as to the defendant's negligence, including the question of proximate cause. *Hudson v. R. R.*, 488.

16. *Railroads—Negligence—Contributory Negligence — Rules—Abrogation—Evidence.*—Where there is evidence tending to show that plaintiff's intestate, an employee of defendant railroad company, was negligently killed in the course of his employment, as he was carrying mail from one train to another, by defendant's locomotive passing on an intervening parallel track, and a violation of the rules of the company prohibiting employees from so using this track is relied upon, to show contributory negligence, testimony that the agents of defendant knew of the continued violation of this rule is competent upon the question of whether the rule had been abrogated. *Ibid.*

17. *Railroads—Street Railways—Negligence—Excessive Speed—Burden of Proof—Instructions—Appeal and Error—Harmless Error.*—The burden of proof is upon the plaintiff to sustain his allegation and contention that he received a personal injury through the negligence of the defendant in running its electric street railway car at an excessive speed, and placing the burden upon the defendant to show that the car was not running at an excessive rate, is reversible error; and the error is not cured by a correct instruction elsewhere appearing in the charge. *Lea v. Utilities Co.*, 511.

18. *Railroads—Street Railways—Negligence—Concurring Negligence—Last Clear Chance—Evidence—Instructions—Appeal and Error—Harmless Error.*—Where there is evidence tending to show that the plaintiff was on horseback, and, seeing the defendant's street car approaching at an excessive speed, when he was ten feet from the track, attempted to urge his horse across instead of stopping, in safety, which he could have done, for the car to pass, which resulted in the injury, the subject of his action: *Held*, assuming the defendant was negligent in running the car at an excessive speed, it is for the jury to determine, upon the question of proximate cause and last clear chance, whether the plaintiff was guilty of negligence which continued and concurred with that of the defendant to the time of impact; for if so, the plaintiff could not recover; and an instruction that fixed liability upon the

RAILROADS—*Continued.*

defendant if the car was running at an excessive speed is prejudicial to the defendant, and constitutes reversible error. *Ibid.*

19. *Railroads—Master and Servant—Employer and Employee—Disobedience to Orders—Freight Train.*—Where an employee of a railroad company has left his home in the service of the company, under an agreement that he is to be returned thereto by one of its trains, and there is evidence that a passenger train was to have stopped for him upon being flagged, but, with the knowledge and approval of the defendant's vice-principal, he took a freight train for that purpose, it is evidence sufficient to take the case to the jury upon the question of whether he was rightfully upon the freight train and not in disobedience of orders, and to hold the company liable in an action to recover damages for an injury proximately caused him by the negligent acts of the defendant's employees in running the train whereon he was riding. *Mitchell v. Southern R. R. Co.*, 645.

20. *Same—Negligence—Instructions—Relative Duties.*—Where there is evidence tending to show that the plaintiff, an employee of the defendant's railroad company, was riding in a caboose on the defendant's freight train, in the course of his employment, with the consent and approbation of the defendant's vice-principal, and the injury complained of was caused by the defendant's employees on the train running it without sufficient headlight, contrary to the statute, and without observing other customary precautions, a charge of the court that the defendant was required to use ordinary care for the plaintiff's safety, and that he should use such relative care for his own safety as this method of travel required, etc., is not to the defendant's prejudice or one of which it may reasonably complain. *Wallace v. R. R.*, 98 N. C., 494; *Marable v. R. R.*, 142 N. C., 557; *Usury v. Watkins*, 152 N. C., 760, cited and applied. *Ibid.*

RAPE. See Appeal and Error, 35; Parent and Child, 1, 2, 3, 4.

RATES. See Carriers of Freight.

RATIFICATION. See Partnership, 2.

REAL PROPERTY. See Wills, 4.

REASONABLE CARE. See Vendor and Purchaser, 2.

RECEIVERS. See Corporations, 2; Insurance, 12.

RECEIVING STOLEN GOODS.

1. *Receiving Stolen Goods — Larceny — Evidence — Appeal and Error — Harmless Error.*—Where, upon the trial for receiving stolen goods, there was evidence tending to show that the defendant's brother-in-law stole the goods and gave them to the defendant's wife and members of his household, and they were found in the attic of defendant's house and upon his person; that he knew where they were, but at first denied this knowledge, and relied in defense upon the theory that his wife's brother had given them to her in his absence, and that he did not know that they had been stolen: *Held*, the exclusion of testimony of the wife's mother, in whose house also some of the stolen goods had been found, as to whether she had seen the stolen goods given to defendant's wife, is harmless and also immaterial, the fact not being

RECEIVING STOLEN GOODS—*Continued.*

controverted and all the evidence tending to show that the defendant and his wife were acting in collusion. *S. v. Wilson*, 751.

2. *Receiving Stolen Goods—Larceny—Instructions—Scienter.*—Where the charge of the judge, construed as a whole, is not prejudicial to the appellant's rights, it will not be held as reversible error on appeal; and where the appellant has been tried for receiving stolen goods, with evidence tending to show that he did so, knowing that they had been stolen, a charge to the jury in effect that they must find the ultimate fact of the defendant's knowledge beyond a reasonable doubt, with the burden of proof on the State, in order to convict him, and so emphasized that the jury could not have well misunderstood the instruction, though not repeated in other disconnected portions of the charge, is not reversible error as to the *scienter*. *Ibid.*

3. *Receiving Stolen Goods—Larceny—Evidence—Inquiry—Knowledge—Scienter.*—Where there is evidence of such facts and circumstances as would put the defendant, tried for receiving stolen goods, upon such inquiry as would lead to knowledge that they had been stolen, the jury may infer that such knowledge had been obtained by him by proper inquiry, and so fined upon the question of *scienter*. *Ibid.*

RECENT POSSESSION. See Criminal Law, 3.

RECORD. See Appeal and Error, 9, 16, 19, 41, 47; Insurance, 26.

RECOVERY. See Costs, 2.

REFERENCES. See Parent and Child, 6.

1. *References—Compulsory—Consent—Pleas in Bar—Accounting—Statutes.*—A compulsory reference may not be ordered by the court except in the instances enumerated in Revisal, sec. 519, and in no event when there is a plea in bar undetermined; and where a suit to set aside a deed to lands for fraud with accounting for the rental of a small tract of land for a few years, and an action for possession and a petition for dower have been consolidated, an allegation of the wife's adultery interposed is one in bar of the wife's right, Revisal, sec. 3083; and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference of each action and proceeding under one form, it is improvidently entered and will be set aside. The difference between a compulsory and a consent reference distinguished by ALLEN, J. *Lee v. Thornton*, 208.

2. *Reference—Exceptions—Issues Tendered—Waiver.*—Where the trial upon a compulsory reference has been concluded before the referee, without exception or demand for a jury trial or issues submitted, the mere exception to the order of reference will not have preserved this right; and where the party now demanding such trial has won before the referee, and the report is before the judge on his adversary's exception, his not having presented the issues he desires the jury to pass upon, and participating in the controversy without objection until the referee's findings have been reversed, will be deemed a further waiver of the right. *Baker v. Edwards*, 229.

3. *Same—Satisfactory Report.*—Where a party excepting to a compulsory reference has won before the referee, he is not relieved of the require-

REFERENCES—*Continued.*

ment that he must preserve his right to a trial by jury by making a demand therefor and submitting the issues he desires to be thus tried, etc., in apt time, even upon his adversary's exceptions. *Ibid.*

4. *Same—Estoppel.*—A party who has excepted to a compulsory order of reference has an election either to preserve his right to a trial by jury or to proceed under the order of reference without it; and his taking the latter course or making use of it without objection will exclude the other one; and where he has not preserved his right to a trial by jury, but attempts to do so by making demand and tendering issues after the judge has reversed the findings of the referee, he will be concluded by the order of the judge, though the findings of the referee were satisfactory to him. *Ibid.*

5. *Reference—Exceptions—Issues—Purpose of Reference.*—Requiring issues to be submitted on exceptions taken on the hearing of a case before the referee is for the purpose of eliminating questions not controverted, and reducing the inquiry to a smaller compass. *Ibid.*

REFORMATION. See Insurance, 11, 13; Contracts, 16; Limitation of Actions, 1.

REFORMATION OF INSTRUMENTS.

Reformation of Instruments — Equity — Mutual Mistake— Evidence— Estates—Deeds and Conveyances—Ratification.—In an action to correct a deed for mutual mistake of the parties, from a conveyance in remainder to a fee-simple title in the first taker, the evidence tended to show that the grantors knew at the time of its execution that the instrument conveyed the estate to the plaintiff for life, with the remainder over; and that the plaintiff was informed a month after the registration of the deed that she took only for life thereunder and acted in some instances in recognition of the rights of the remainderman, and so held the possession for many years: *Held,* the evidence was insufficient for reformation of the instrument, and the plaintiff having taken under the deed must be held to have affirmed it as it was written. *Hill v. Hill,* 194.

REFORMATORY. See Evidence, 50.

REGISTER OF DEEDS.

Register of Deeds—Index—Registration—Deeds and Conveyances—Title—Purchasers for Value.—The indexing of deeds in the office of the register thereof is an essential part of the registration; and where the grantor's name has been omitted from the book, a subsequent grantee of the same lands from the same grantor acquires the title from him. *Fowle v. Ham,* 12.

REGISTRARS. See Elections, 4, 12; Road Districts, 4.

REGISTRATION. See Register of Deeds, 1; Elections, 7, 12; Road Districts, 1; Insurance, Fire, 1, 3.

REISSUANCE. See Insurance, 5.

REMAINDERS. See Estates, 2, 6, 7, 11.

REMOVAL OF CAUSES. See Venue, 1; Appeal and Error, 34.

REPORT. See Reference, 3.

REPOSSESSION. See Mechanics' Liens, 6.

REQUESTS. See Evidence, 3; Instructions, 7.

RESISTING ARREST. See Criminal Law, 14.

RESTRAINT OF TRADE. See Contracts, 17, 22.

RESULTING TRUSTS. See Contracts, 25.

RETROACTIVE. See Statutes, 1.

REVERTER. See Easements, 2.

REVISAL.

SEC.

367. Holder of note against deceased maker may bring action within a year after the granting of letters of administration, if issued within ten years after the maker's death. In this case the discontinuance of the action for parties does not affect the principle. *Geitner v. Jones*, 452.

371. Parol promise, upon consideration, not to plead the statute of limitation is valid. *Oliver v. Fidelity Co.*, 598.

375. An extension of credit upon the one side alone is not a mutual account whereon the statute of limitations begins to run from the last item. *Hollingsworth v. Allen*, 629.

391 (3). Where maker may bring action within a year from letters of administration on estate of deceased maker, and the note is not barred, foreclosure of deed of trust on land securing note may be ordered. In this case the discontinuance of the case for parties does not affect the principle. *Geitner v. Jones*, 452.

395. Defense to an action to set aside a deed for fraud and mistake, that deed should be reformed to show further consideration, unfulfilled, burden of proof is on defendant. *Taylor v. Edmunds*, 325.

400. Father may maintain action against one who has debauched his daughter if latter is under twenty-one years of age; if over that age, by the daughter. *Tillotson v. Currin*, 479.

513. Motion for relief from judgment for mistake, surprise, etc., is within the meaning of this section. *Mann v. Mann*, 353.

519. Compulsory reference may not be ordered where there is plea in bar, as when action has been consolidated with proceedings in dower, with allegation of wife's adultery, sec. 3083. *Lee v. Thornton*, 208.

652. This section has no application when lessor may terminate lease of lands, because not in writing. *Ferrell v. Mining Co.*, 475.

652-653. Betterments made in good faith, etc., may be recovered, though made with knowledge of adverse claim of title. The three-year statute of limitations does not apply. *Pritchard v. Williams*, 108.

856. Order of court that witness answer a question he had refused to do before commissioner is erroneous, as depriving adverse party of right of cross-examination, sec. 865. *Cartwright v. R. R.*, 36.

REVISAL—*Continued.*

SEC.

865. Order of court for witness to answer question refused before commissioner, without opportunity for adverse party to cross-examination, is error. *Ibid.*

866. Clerk of another county than that wherein action is pending is without authority in proceedings to examine adverse party. *Vyne v. Fogle Bros.*, 351.

916. A parol lease of lands for "so long as lessee may pay rent" is within the meaning of the statute, and terminable at will of lessor, permitting the lessee to recover the amount he has paid under the terms of the contract, less a reasonable rent. *Ferrell v. Mining Co.*, 475.

1130. To secure preference in tort over corporation's mortgage, necessary to commence action in sixty days after registration. *Joyner v. Reflector Co.*, 274.

1131. Confers no lien on one injured by corporation's tort, but only eliminates preference of prior mortgage under certain conditions. *Ibid.*

1264, 2. Recovery of plaintiff, alleging fraud, entitles him to costs though he fails to prove fraud. *Auto Co. v. Rudd*, 497.

1250. Fee for docketing in Supreme Court is not covered by plaintiff's undertaking, and clerk may demand its prepayment. *Dunn v. Clerk's Office*, 50.

1458. Written pleadings filed in justice of the peace courts subject to same rules as to allegations and denials as in Superior Court. *Parker v. Horton*, 143.

1578. This section does not apply when the intent of the grantor otherwise appears from the expression used. *Smith v. Parks*, 406.

1631. Adversary party restricted to matters of evidence opened up by party claiming under deceased persons in relation to transactions and communications. *Pope v. Pope*, 283.

1631. Beneficiary under will may not testify that holograph will was left with him for safe-keeping, sec. 3127. *McEwan v. Brown*, 250.

1675. Repealing public-local statute placing Pender County among those specified in this section does not affect Public-Local Act of 1915 relating to Pender County; and where a county has not been established according to law, equity will grant injunction. *Marshburn v. Jones*, 516.

1681. Dogs are not regarded as stock, but an action may be maintained to recover them. *Meckins v. Simpson*, 130.

1855. The attendance of a witness under sentence of death, procured by the State in the trial of another for homicide, is not objectionable, and his testimony will be admitted. *S. v. Jones*, 702.

1954. A comma should be read in between the words "bonds" and the words "and judgments." *In re Chisholm's Will*, 211.

2016-2019. A subcontractor furnishing trenching machine for sewer pipe in city's street, at so much per foot, is a laborer within the meaning of the statute. *Scheflow v. Pierce*, 91.

REVISAL—*Continued.*

SEC.

2021, 2018, 2027, 2028. As to materialmen, subcontractors, etc., for railroads are not in conflict with each other or with chapter 150, Laws of 1913. *Powder Co. v. Denton*, 462.

2021. Notice may either be given by lienors for labor or material or by the contractor and to the architect is insufficient without further evidence of agency; also, mere knowledge of the owner. *Holland v. Benevolent Assn.*, 87.

2107. Husband living with wife on her land under a deed void for noncompliance with this section is no evidence of his adverse possession and no cloud on his title; taking under husband's will does not estop her to deny deed's validity; her declarations as to deed are incompetent; children of the marriage is no presumption of ouster. *Schermer v. Dobbins*, 547.

2107. The certificate of the justice of the peace required by this action applies when title to land, purchased with wife's money, is conveyed to them both. *Deese v. Deese*, 527.

2107. Wife conveying her separate realty, taking purchase-price notes to herself and husband, secured by mortgage, is no evidence of her gift to him, and administrator of wife may sue to recover them. *Kilpatrick v. Kilpatrick*, 182.

2201, 2208. The plaintiff in an action to recover on a note given for jewelry depended on the ground of fraud and not up to sample must show he was purchaser for value, due course, etc., and defendant's evidence as to price and quality is admissible. *Discount Co. v. Parker*, 546.

2276, 2279. Bank many not resist payment of draft accepted by it from holder in due course on the ground of *ultra vires* when it may be regarded as inland bill of exchange authorized by its charter. *Sherrill v. Trust Co.*, 591.

2628. Notice to passengers not to ride on the platform of railway cars need only be in English, and the findings of the jury in this case was upon the question of proximate cause. *Bane v. R. R.*, 247.

2632. Penalty for negligent delay may be recovered on interstate shipments *Bivens v. R. R.*, 415.

2804. Fee for docketing in Supreme Court is not covered by plaintiff's undertaking and clerk may demand its prepayment. *Dunn v. Clerk's Office*, 50.

2895, 2896. Sheriff's deed is not void for description when owner has only one tract of land in the county and reference to his deed would give sufficient description. *Stone v. Phillips*, 457.

2903, 2904. The statutory notice is required of the transferee when county has bid in lands at tax sale, and the affidavit of holder of certificate must be filed, etc. *Sanders v. Covington*, 454.

3082. Widow not estopped to dissent from husband's will by final judgment in proceedings to make assets, without objection, though a party. *Trust Co. v. Stone*, 270.

REVISAL—*Continued.*

SEC.

3083. Allegation of adultery is plea in bar of wife's right to dower, and compulsory reference is error. *Lee v. Thornton*, 208.

3127. Beneficiary may not testify that holograph will was left with him for safe-keeping. *McEwan v. Brown*, 250.

3287. Evidence that one convicted of murder had committed the crime the morning after the request of the wife and at the time and place she designated is competent as to the wife being an accessory before the fact. *S. v. Jones*, 702.

3354. The supporting evidence in this case is held sufficient to render competent the testimony of the prosecutrix in an action for seduction under this section. *S. v. Carroll*, 731.

4305, Greg. Supp. County board of elections order new registration or order new "polling book" of voting precincts, and registrar may not erase name of qualified voter at his request. *Williams v. Comrs.*, 554.

4331. The instructions of the judge as to qualification of electors, etc., under "grandfather" clause is approved in this case. *Woodall v. Highway Commission*, 378.

4612, 4622. The offense of resisting arrest does not fall within the intent or meaning of our statutes establishing a department for the criminal insane. *S. v. Craig*, 740.

4775, Pell's. Transactions leading up to acceptance of policy of life insurance merge therein. *In re Means*, 313.

5005a. The pension roll determines the county to pay the twenty dollars for burial of the pensioner. *Hannah v. Comrs.*, 395.

5217, 5218, 5233. The validity of a sheriff's deed to lands for nonpayment of taxes depends upon their listing in accordance with the statutes. *Stone v. Phillips*, 457.

RIGHTS OF WAY. See Railroads, 4.

ROAD DISTRICTS. See Constitutional Amendment, 1.

1. *Road Districts — Roads and Highways — Constitutional Law — Elections — Special Registrations — Majority Vote — Statutes.*—The construction and improvement of public roads are a necessary expense, within the meaning of our Constitution; and for that purpose the Legislature, by the passage of an act meeting the constitutional requirements, as to its passing on the three several days and the recording of the "aye" and "no" vote (Art. II, sec. 14), may pass a valid act to become effective without submitting the question to the vote of the territory prescribed; and an act passed accordingly, requiring only a majority vote under a special registration for a road district as sufficient for the validity of bonds to be issued for the improvement of a public road within the district, is constitutional; and an objection that it should have required a majority of the qualified votes therein is untenable. Constitution, Art. VII, sec. 7. *Woodall v. Highway Commission*, 377.

2. *Road Districts — Cities and Towns — Constitutional Law — Statutes.*— The Legislature has constitutional authority to change, divide, and subdivide, or abolish the lines of counties, townships, and cities, or to

ROAD DISTRICTS—*Continued.*

bring them, in whole or in part, within districts it may establish for road purposes; and where an incorporated town lies within a created road district and will receive the benefits of a road to be improved therein, it may not be objected that the road only came to its corporate limits and that therefore the act was unconstitutional in its provisions. *Ibid.*

3. *Road Districts — Single Highway — Constitutional Law.*—The Legislature may create a district for the improvement and maintenance of a single road, within its constitutional authority to create road districts, by statute passed in accordance with the constitutional requirements. *Ibid.*

4. *Road Districts—Statutes—Constitutional Law—Delegated Authority—Registrars—Poll-holders.*—Where the Legislature has passed a valid statute creating a road district, it may confer authority on the commissioners of an incorporated town therein to appoint the registrars and poll-holders of an election to be held therein by the voters within the district. *Ibid.*

5. *Road Districts—Statutes—Bonds—Sales—Road Commissioners—Delegated Powers—Constitutional Law.*—Legislative authority given to the commissioners of a special road district created by the act to sell bonds for the purposes of the roads to be improved and maintained, within their discretion, at a price not less than par, is constitutional and valid. *Ibid.*

ROADS AND HIGHWAYS. See Conversion, 1; Road Districts, 1.

RULES. See Railroads, 16; Estates, 1, 3, 4, 6.

RULES OF COURT. See Evidence, 3; Instructions, 7.

SAFE PLACE TO WORK. See Master and Servant.

SALESMEN. See Principal and Agent, 18.

SALES. See Trusts and Trustees, 6, 8, 9, 13; Actions, 5; Road Districts, 5; Taxation, 1, 2, 3, 4, 5; Contracts, 25, 26.

1. *Sale — Statutes — Sheriff's Deed — Reference to Owner's Deed.*—Under the provisions of the Revisal, sec. 2895, a sale of land for taxes shall not be invalid by reason of certain irregularities; and section 2896, defining these irregularities, among other things, provides that the description on the tax list will be definite enough if sufficient to enable the sheriff, or any person interested, to determine what property is meant or intended by the description, and in such case a defective or indefinite description may be made definite by the sheriff in his deed; hence, where the owner has but one lot or tract of land within the corporate limits of a town, and reference to his deed would readily give a full description thereof, the sheriff's deed to the purchaser at the sale for taxes incorporating this description in his deed is sufficiently definite of the land therein conveyed to pass the title. *Stone v. Phillips*, 458.

SALES—*Continued.*

2. *Sales— Assignment of Bid— Contracts— Parol Agreement— Trusts and Trustees—Equity.*—It is against equity and good conscience to permit a purchaser of land at a commissioner's sale to repudiate his agreement to assign his bid to another and have conveyance made direct to him upon the payment of the purchase price, because the agreement rested in parol, and thus set up the statute of frauds, to his own advantage, in repudiation of the parol trust he had assumed. *Rush v. McPherson*, 563.

3. *Sales— Personal Property — Payment — Title — Conditions Precedent— Lumber— Measurement by Purchaser— Claim and Delivery— Vendor and Purchaser.*—Where the sale of personal property is agreed upon, without mention as to the time of payment of the price, the law will presume a cash payment by the purchaser at the time of its delivery; and where the contract was for the sale of lumber, to be measured by the purchaser, upon delivery, to ascertain the amount of the purchase price upon a rate agreed upon, the title does not pass to him until such measurement has been made, as a condition precedent; and when he fails to measure the lumber, and refuses payment therefor, claim and delivery will lie against him. *Davidson v. Furniture Co.*, 569.

SCHOOL DISTRICT. See Elections, 10; Taxation. 7.

School Districts — Statutes — Requirements — Interpretation.—A special school district may not be formed under the provisions of our statutes if the proposed district has less than sixty-five children of school age, unless the same shall contain twelve square miles of territory, etc.; and where it has been properly established that the extent of the proposed area meets the requirement of the statute, the provision as to the number of children of the school age within the district becomes immaterial. *Williams v. Comrs.*, 554.

SCHOOLS. See Contracts, 9; Elections, 13; Constitutional Law, 4, 5; Taxation, 9.

SCIENTER. See Receiving, 2, 3.

SEALS. See Partnership, 1; Contracts, 32, 33.

SEDUCTION. See Incest, 1; Appeal and Error, 35; Parent and Child, 1, 2, 3, 4.

1. *Seduction— Actions— Parties— Infants— Female.*—An action for damages for seduction may be maintained by a female under twenty-one years of age, in her own name and right, against her grandfather, upon the ground that he took advantage of his influence over her innocence and virtue to accomplish his unlawful purpose. *Strider v. Lewey*, 448.

2. *Seduction—Promise of Marriage—Evidence, Supporting—Good Character—Virtue—Statutes.*—On the trial of an indictment for seduction under promise of marriage, the innocence and virtue of the prosecutrix, as testified to by her, may be sufficiently supported by evidence of her previous good character. *S. v. Fulcher*, 724.

3. *Seduction—Promise of Marriage— Sexual Act— Paternity— Evidence— Statutes.*—Where there is evidence that the defendant, indicted for seduction under promise of marriage, had frequently and almost exclusively gone with the prosecutrix at and before the time of concep-

SEDUCTION—*Continued.*

tion, had admitted an engagement of marriage to her mother, and had refused a request to visit her when the consequences had developed, together with the birth of the child, it is sufficiently supporting, under the statute, of her direct testimony of the sexual act and the paternity of the child for the determination of the jury. *Ibid.*

4. *Seduction—Promise of Marriage—Promise— Evidence— Statute.*—Upon the trial for seduction under promise of marriage, testimony that the defendant admitted to others the promise of marriage; that he paid assiduous and almost exclusive attention to the prosecutrix at the time she alleges the act was committed by them, with the other relevant circumstances of this case, is held sufficient, under the statute, as supporting evidence of her direct testimony that he had promised to marry her and that she had thereby been persuaded to yield to him. *Ibid.*

5. *Seduction—Promise of Marriage—Time of Promise—Evidence—Instructions.*—The promise to support an indictment for seduction, under the statute, must have preceded the illicit intercourse, and in this case it is *Held* that the judge's charge, under the evidence, properly so confined it. *Ibid.*

6. *Seduction—Promise of Marriage—Corroborative Evidence.*—Testimony of the mother as to what the prosecutrix said of the defendant's promise of marriage is corroborative evidence in an action for seduction, under the statute, though not supporting in the proper sense of the word. *Ibid.*

7. *Seduction—Promise of Marriage—Prosecutrix—Supporting Evidence—Statutes—Criminal Law.*—Upon a trial for seduction under a promise of marriage, the direct testimony of the prosecutrix is sufficiently supported by other testimony which tends to show the previous good character of the prosecutrix; that she and defendant went continuously together, as engaged people, for two years; that she told her father and mother of the promise and of her love for the prisoner when her condition was first discovered, and that the child was born nine months after the prisoner's purpose was accomplished; and a motion to nonsuit was properly denied. Revisal, sec. 3354. *S. v. Cooke*, 731.

SELF-DEFENSE. See Appeal and Error, 57.

SERVICES. See Appeal and Error, 28; Parent and Child, 12.

SEWAGE. See Judgments, 27; Contracts, 6.

SHADE TREES. See Municipal Corporations, 4.

SHELLEY'S CASE, 1, 3, 4, 6.

SHERIFFS. See Sales, 1.

SHERIFF'S DEED. See Taxation, 5.

SLANDER.

Slander— Bastardy— Indictable Offense— Pleadings — Demurrer.—Allegations that the defendant spoke false, slanderous, and defamatory words of the plaintiff, that a certain woman said that he was the

SLANDER—*Continued.*

father of her child, are those charging bastardy, and, though involving moral turpitude, is not an indictable offense carrying with it infamous punishment; and upon the failure of the complaint to allege special damages, it is demurrable. *Yates v. Ins. Co.*, 401.

SLEEPING CARS. See Railroads, 3; Pleadings, 4.

SOFT DRINKS. See Vendor and Purchaser, 2.

SON-IN-LAW. See Parent and Child, 5.

SPECIFIC PERFORMANCE. See Contracts, 32, 33, 35.

SPEED. See Railroads, 17; Criminal Law, 8.

STATE GRANTS. See Evidence, 21.

STATEMENTS. See Evidence, 47; Appeal and Error, 40.

STATE'S LANDS. See Appeal and Error, 10, 12.

State's Land—Entry—Protest—Issues—Form.—State's land is not vacant and subject to entry if it has been already granted by the State, and a protestant claiming under the prior grant need not necessarily connect his title therewith in order to defeat the junior entry; and the form of an issue is objectionable which submits the question as to whether the protestant was seized and possessed of the *locus in quo*. *Land Co. v. Maxwell*, 140.

STATION. See Carriers of Passengers, 3.

STATUTE OF FRAUDS. See Contracts, 15, 26; Landlord and Tenant, 1.

1. *Statute of Frauds—Pleadings.*—The defendant cannot successfully avail himself of the statute of fraud when he neither denies the debt or pleads the statute. *Geitner v. Jones*, 542.

2. *Statute of Frauds—Bills and Notes—Prior Indebtedness—Trusts and Trustees—Writing.*—A note given for the payment of a debt existing prior to, but secured by the deed in trust for the benefit of creditors, is in recognition of the old debt, and not a novation, and the transaction is within the intent of the statute of frauds requiring that contracts concerning lands, etc., shall be in writing. *Ibid.*

STATUTES. See Master and Servant, 1, 2; Witnesses, 1; Appeal and Error, 2, 28, 31; Elections, 2, 5, 7, 12; Mechanics' Liens, 1, 4, 5; Carriers of Freight, 1, 2; Betterments, 1, 2; Supersedeas, 2; Clerk of Court, 2; Contracts, 6, 19; Animals, 1; Trusts and Trustees, 1, 2; Partnership, 5; Reference, 1; Husband and Wife, 2, 5, 10, 11, 12, 14; Judgments, 14, 15, 23; Drainage Districts, 1, 9; Carriers of Passengers, 2; Wills, 5, 6; Corporations, 1, 3; Evidence, 9, 36, 39; Insurance, 12; Road Districts, 1, 2, 4, 5; Pensions, 1; Estates, 7; Commerce, 1; Railroads, 5, 14; Constitutional Law, 1; Courts, 7, 9; Taxation, 1, 4, 6, 9, 10; Parent and Child, 2; Sales, 1; Sunday, 1; Costs, 2; Dower, 1; Limitations of Actions, 1, 6; School Districts, 1; Banks and Banking, 1; Homicide, 1; Seduction, 2, 3, 4, 7; Criminal Law, 14.

1. *Statutes—Interpretation—Supreme Court Decisions—Property Rights—Overruled Decisions—Retroactive Effect.*—Where property rights are

STATUTES—*Continued.*

acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect; and where a deed has not been properly indexed, but valid to pass title against a subsequent purchaser, under the decision of *Davis v. Whitaker*, rendered in 1894, and registered prior to *Ely v. Norman*, 175 N. C., 299, which overruled the former decision, the rights thus acquired will not be disturbed. *Fowle v. Ham*, 12.

2. *Statutes, Penal—Interpretation—Partnership—"Assumed Name."*—Section 1, chapter 77, Laws of 1913, prohibiting, in general terms, the conducting, carrying on, or transacting a business in this State under an assumed name, without filing a certificate with the clerk of the court of the county, showing the name of the owner, making the forbidden act a misdemeanor, is of a highly penal character, and its meaning will not be extended by interpretation to include cases that do not come clearly within its provision. *Jennette v. Coppersmith*, 82.

3. *Statutes—Partnership—"Assumed Name"—Contracts, Illegal.*—Where a partnership is conducted under an "assumed name," without having complied with the requirements of section 1, chapter 77, Laws 1913, in having filed the certificate with the clerk of the court of the county, its contracts are not enforcible in the courts of this State. *Ibid.*

4. *Statutes—Partnership—"Assumed Name"—Interpretation—Surname.*—Where brothers are engaged in business under the name of Jennette Brothers Company, the word "company" may be taken to denote a partnership, and will not come within the provision of the statute requiring that a business conducted under an "assumed name" must be registered with the clerk of the Superior Court of the proper county, showing the business name of the owner; the words "assumed name" meaning a fictitious name and not applying when the true surname of the partners are correctly given, and afford a reasonable and sufficient guide to correct knowledge of the individuals composing the firm. *Ibid.*

5. *Statutes—Interpretation—Attorney-General—Long Acquiescence.*—The opinion of the Attorney-General, interpreting a statute, sanctioned by long acquiescence and without legislative change, is entitled to respectful consideration by the court. *Hannah v. Comrs.*, 395.

6. *Statutes—Presumptions—Title—Prospective Effect.*—The statutory presumption of chapter 195, Laws 1917, that the disputed title to lands is out of the State unless the State is a party or the trial is of a protested entry, was effective, by the express terms of the statute, from 1 May, 1917, and has no application to this action theretofore commenced. *Riddle v. Riddle*, 485.

7. *Statutes—Stock—No-Fence Law—"Change of Fence."*—The requirement of Revisal, sec. 1675, that the counties therein named may withdraw from the operation of the no-fence law, upon the conditions specified therein, if funds are provided by a tax levy, etc., for "changing the fence," is to provide against trespass by the running at large of stock into no fence territory, and contemplates the change from the one system to the other; and the position is untenable that the statute is inapplicable when the fence has long since been lawfully removed or destroyed. *Marshburn v. Jones*, 516.

STATUTES—*Continued.*

8. *Statutes—Repealing Statutes—Conflict—Stock—No-Fence Law—Fences.* Where a statute amends Revisal, sec. 1675, by adding a part of another county to those therein named as having the right to withdraw from the stock law under certain conditions, and makes the building of the fence around the outer boundaries of the proposed district a condition precedent to the exercise of this right, repealing conflicting laws, the condition imposed by the later statute is not in conflict with the provisions of the section of the Revisal requiring that the expense of the fence be met by a tax levy, etc. *Ibid.*

9. *Statutes—Public Policy—Stock—No-Fence Law—Fences.*—Our public policy with respect to the running of stock at large has been changed by our statutes on the subject of "no-fence" or stock laws, and the uniformity, with slight exception, of their application to the entire State; and while Revisal, sec. 1675, permits the counties therein enumerated to withdraw, upon certain conditions, from "stock-law" territory, this is to be done with regard to the rights of those districts where the law is effective, requiring that the districts withdrawing therefrom shall erect the boundary fences necessary to keep the stock from trespassing upon the rights of the larger class of people within the "no-fence" territory. *Ibid.*

10. *Statutes—Repealing Statutes—Conflict—Stock—Fences—No-Fence Law.* The act of 1917, placing Pender County among those specified in Revisal, sec. 1675, as having the right to withdraw from stock-law territory, etc., by repealing all laws in conflict therewith, does not affect the provision in the Public-Local Laws of 1915 relating to Pender County, and requiring as a condition precedent that, before its operative effect, a fence shall be built around the defined district. *Ibid.*

11. *Statutes — Criminal Law — Offense Specified — General Description.*— Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by proper interpretation, be confined to acts and things of the same kind. *S. v. Craig*, 740.

12. *Statutes—Penal Statutes—Criminal Law—Insanity—Acquittal—Detention of Prisoner—Judicial Investigation.*—Our statutes giving to the trial judge the authority to detain the prisoner found not guilty of a criminal offense because of insanity or mental incapacity, and to make an investigation upon the question of committing him to the department of the criminal insane, is penal in its character. Revisal, secs. 4612-4622. *Ibid.*

STATUTE OF LIMITATION. See Principal and Agent, 10; Contracts, 27.

Statute of Limitations—Nonsuit—Administration—Statutes.—Where Revisal, sec. 367, relating to the time of bringing an action on a note within a year after letters of administration granted, if within ten years from the death of deceased maker, and section 391 (3), relating to the foreclose of the security for the note, apply, their provisions are not affected by the fact that additional parties to the action, ordered by the Supreme Court, had not been made before a succeeding term of the Superior Court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal. *Geitner v. Jones*, 543.

STATUTE OF USES. See Trusts and Trustees, 2; Constitutional Law, 2.

STOCK. See Statutes, 7, 9, 10; Injunctions, 2.

STRANGERS. See Carriers of Passengers, 4.

STREETS. See Municipal Corporations, 1; Deeds and Conveyances, 1.

STREET CARS. See Railroads, 1.

STREET RAILWAYS. See Railroads, 17, 18.

STREETS AND SIDEWALKS. See Municipal Corporations; Negligence, 3.

SUBCONTRACTOR. See Mechanics' Liens, 5; Liens, 1.

SUBROGATION.

1. *Subrogation — Bills and Notes — Endorsers — Mortgages — Evidence — Questions for Jury—Trials—Equity.*—The endorsers on a note of a corporation secured by mortgage on its property are not entitled to subrogation, either legal or conventional, when it is ascertained that the note was paid by the corporation, and not the endorsers, and where there is evidence that the latter had paid it the question should be submitted to the jury. *Joyner v. Reflector Co.*, 275.

2. *Subrogation—Legal—Conventional.*—As distinguished from legal subrogation, conventional subrogation is founded on the agreement of the parties in the nature of an equitable assignment, while the former exists where one who has an interest to protect, or is secondarily liable, makes payment of the obligation. *Ibid.*

SUNDAY.

Sunday—Statutes—Bills and Notes—Checks—Mechanics' Liens.—Where a mechanic has repaired an automobile for its owner during the week and delivered possession to him on Sunday, on receipt of his check to cover his charges, the fact that the check was dated on Sunday does not render it invalid under our statute, Revisal, sec. 2836, or permit the owner to stop its payment and retain the car in his possession, so as to release it from the lien thereon for the amount of the repairs. *Auto Co. v. Rudd*, 497.

SUPERSEDEAS. See Certiorari, 1.

1. *Supersedeas—Ancillary Remedy—By Whom Granted—Supreme Court.* A supersedeas is ancillary to a writ of error, and the former may be granted by the same judge who has granted the latter, or both may be granted by a justice of the Supreme Court of the United States. *Dail v. R. R.*, 116.

2. *Supersedeas—State Supreme Court—United States Statutes—Petition to State Supreme Court.*—Where an appeal has been remanded and certified to the Superior Court, which presents a Federal question and which the appellant desires to have reviewed by the Supreme Court of the United States, his procedure should conform to the requirements of the Federal statutes (Laws 1916, ch. 448), and his petition to the State Supreme Court for a supersedeas to stay the execution of the judgment it has certified down will be denied. *Ibid.*

SUPREME COURT. See Clerks of Court, 1; Appeal and Error, 8, 15; Jurisdiction, 1; Certiorari, 1; Supersedeas, 1, 2; Courts, 8; Statutes, 1.

SURNAME. See Statutes, 1.

SURPLUS. See Trusts and Trustees, 8.

SURVEY. See Deeds and Conveyances, 8.

TAXATION. See Constitutional Law, 1, 5, 6; Courts, 9; Elections, 13.

1. *Taxation— Sales— Purchaser— County— Transferee— Statutes— Deeds and Conveyances.*—It is necessary to the validity of the sheriff's deed to land sold for nonpayment of taxes that the statutory notice shall have been given the owner or mortgagee of the land, notice by publication to redeem, etc. (Revisal, sec. 2903), and that the affidavit of the holder of the certificate be filed (Revisal, sec. 2904); and these requirements are not dispensed with when the land is bid in by the county and the bid transferred, and the transferee acquires the deed direct from the sheriff, for the transferee then stands in the same relation to the owner as if he had bid off the property originally, and the special statutory provision as to the county has no application. *Sanders v. Covington*, 454.

2. *Taxation—Sales—Deeds and Conveyances— Evidence— Presumptions— Instructions—Trials.*—A sheriff's deed to lands sold for the nonpayment of taxes is presumptive evidence that the land was subject to the taxes for the year therein stated; that the taxes had not been paid before the sale; that the property had been listed and assessed; that the taxes had been levied according to law; that the property was sold for taxes, as stated in the deed, and that all statutory notices had been duly served and advertisements duly made; and in an action by the owner against the purchaser at the tax sale, in possession, where the tax deed has been introduced in evidence, and it is admitted that the purchaser's affidavit as to notice and his deed are in due and proper form, a charge of the court to find for the plaintiff, if the evidence is believed, is reversible. *Stone v. Phillips*, 457.

3. *Taxation—Sales— Deeds and Conveyances— Tax Lists— Description.*— Where land has been conveyed by the sheriff for the nonpayment of taxes, under the statute, it is not required for the validity of his deed that the land should have been described with particularity or detail on the tax list, for the designation thereon is sufficient if it affords reasonable means of identification and does not positively mislead the owner or persons interested. *Ibid.*

4. *Taxation—Sales—Tax Lists—Listing for Taxes—Owner's Name—Principal and Agent — Statutes.*—The seeming hardships imposed by Revisal, sec. 2894, declaring that no sale of real estate for taxes shall be valid because the land was charged on the tax list in the name of any other than the rightful owner, is minimized or removed by the last clause of the section, which invalidates the sale, if the rightful owner has listed the lands and paid the taxes, for it was his duty to have done so, and not that of the officials to perform the impossible task of examining into the existence of all title appearing in the registration books. *Ibid.*

5. *Taxation— Sales— Deeds and Conveyances— Sheriff's Deeds— Description— Listing for Taxes— Owner's Name— Evidence— Instructions— Appeal and Error—Trials.*—The owner of lands within an incorporated town sold a part thereof, and the whole of this tract was listed

TAXATION—*Continued.*

on the tax books in the name of the original owner, designated as that within the town, and, after notice to him and his purchaser, was sold for taxes, and a deed made therefor by the sheriff to a purchaser at the sale for taxes, sufficient in form to pass the title, with description obtained by reference to the deed made to the original owner, who had only this lot of land within the town. The purchaser at the tax sale entered into possession, and the grantee of the original owner brought his action involving the title. Upon the evidence in the case: *Held*, an instruction by the court to the jury to answer the issue for the plaintiff, if they believed the evidence, is reversible error. *Ibid.*

6. *Taxation—Listing for Taxes—Statutes.*—In order for the sheriff's deed to convey the title to the purchaser of lands at the sale for the nonpayment of taxes, it is required that the lands shall have been listed in accordance with the provisions of law—that is, by the owner or duly accredited agent, in cases where listing by the agent is permissible (Revisal, secs. 5217-8); otherwise, by the chairman of the board of county commissioners. Revisal, sec. 5233, etc.; *Rixford v. Phillips*, 159 N. C., 213, cited and approved. *Ibid.*

7. *Taxation—School Districts—Elections—Constitutional Law.*—One who is qualified to vote at an election to establish a statutory expense and falls within the provision of our Constitution, Art. VII, sec. 7, requiring the approval of a majority of the qualified voters therein. *Williams v. Comrs.*, 554.

8. *Taxation—Injunction—Majority Vote.*—Where it appears from the trial of the action upon its merits that the proposition to establish a special school-tax district has been carried by a majority of one vote, ascertained only after the registrar had improperly erased the name of a voter from the registration book, the restraining order theretofore granted should be made permanent. *Ibid.*

9. *Taxation—Ballots—Antagonistic Propositions—Schools—Townships—Statutes.*—Where statutory authority is given to a county to submit to its voters the question of levying a tax to supplement its county school funds, and provision is made that, upon a favorable vote, the tax shall be levied and collected in the same manner and at the same time as other taxes of the county are levied and collected, with further like provision as to the townships therein; and it is further provided that should the county vote against the tax, an election may be held at any time thereafter in any township that has failed to vote for the tax: *Held*, the provisions as to the county and township in relation to the tax, for the purpose authorized, are twofold and antagonistic, the one for the county tax and the other for the township tax, depriving the voter of his right to choose between the two propositions if submitted upon a single ballot; and where this has been done, and the county at large has voted against the proposition, it may not be declared as carried as to a township therein which has cast a majority of its votes in its favor at the same election and upon the single ballot. *Hill v. Lenoir Co.*, 572.

10. *Same—Interpretation of Statutes.*—A legislative act which authorizes an election to be held upon the question of levying a tax to supplement its county school fund, providing that if any of its townships should cast a majority of its votes in its favor it should apply only

TAXATION—*Continued.*

to the township, should the county as a whole reject the proposition, requiring but a single ballot upon the two propositions, is contrary to public policy and to our Constitution. Art. VII, sec. 7, and void. *Ibid.*

TAX DEEDS. See Deeds and Conveyances, 2.

TAX LISTS. See Limitation of Actions, 5.

TELEGRAMS. See Contracts, 3, 4, 5.

TELEPHONES. See Contracts, 4.

TENANTS BY THE CURTESY. See Husband and Wife, 8, 9.

TENANTS IN COMMON. See Estates, 6; Limitation of Actions, 2.

1. *Tenants in Common—Partition—Parol Agreement.*—A parol petition of lands by tenants in common is invalid unless the title is established by sufficient adverse possession under the statutes of limitation. *Stallings v. Walker*, 321.

2. *Tenants in Common—Partition—Deeds and Conveyances—Conditional Execution—Clerks of Court.*—Where a married woman seeks to partition lands as tenant in common, and the defense is interposed that the lands had been formerly divided by interchangeable deeds, and the cause has been transferred to the civil issue trial docket, and upon issues raised it has been determined by the jury upon sufficient evidence, with the burden of proof on the plaintiff, that she had signed her deed upon condition that her husband should give his written assent, which he did not do, and the deed had not been delivered: *Held*, the deed was inoperative and the cause was properly remanded to the clerk to proceed with before him. *Ibid.*

3. *Tenants in Common—Partition—Title.*—Proceedings to partition lands, unless the title has been made an issue, have only the effect of apportioning the lands among the tenants under their common title. *Ibid.*

THREATS. See Homicide, 11, 12.

TIMBER. See Contracts, 9, 32, 33, 35.

TITLE. See Register of Deeds, 1; Wills, 1, 4, 8; Betterments, 1; Estates, 4; Clerks of Court, 4; Evidence, 4, 32; Statutes, 6; Partition, 1; Husband and Wife, 8, 14; Insurance, Fire, 2; Sales, 3; Deeds and Conveyances, 10; Appeal and Error, 10, 34; Trusts and Trustees, 5, 9; Pleadings, 6; Ejectment, 2; Tenants in Common, 3; Limitation of Actions, 4, 5; Venue, 1.

TORTS. See Conversion, 1; Appeal and Error, 14; Contracts, 9, 39; Principal and Agent, 2; Corporations, 1, 3; Negligence, 7, 9; Actions, 7.

Torts—Joint Tort Feasors—Evidence.—Where an injury is caused to another by a wrong committed by different parties who owe him the same duty, and their acts naturally tend to a breach thereof, the wrong may be regarded as joint, for which both of the parties committing it may be held liable as joint tort feasors; and the joint tort may be shown by direct proof or by circumstantial evidence, such as the relationship of the parties, their dealing with each other, and their acts and conduct before and after the tort, when relevant to the inquiry. *Williams v. Lumber Co.*, 174.

TOWNSHIPS. See Elections, 13; Constitutional Law, 5; Taxation, 9.

TRANSACTIONS AND COMMUNICATIONS. See Evidence, 1, 8.

TRANSFER OF CAUSES. See Venue, 1; Appeal and Error, 34.

TRANSPORTATION. See Carriers of Freight, 2; Commerce, 1.

TREES. See Conversion, 1.

TRIALS. See Electricity, 1, 4; Executors and Administrators, 2; Partnership, 3; Appeal and Error, 6, 10, 38, 52; Master and Servant, 3, 7, 9; Betterments, 1; Contracts, 7; Trusts and Trustees, 8; Subrogation, 1; Negligence, 6, 7, 12; Railroads, 3, 8; Bills and Notes, 3; Municipal Corporations, 5; Parent and Child, 3; Taxation, 2, 5; Limitation of Actions, 4, 8; Evidence, 22, 23, 30, 35; Principal and Agent, 8, 18; Carriers of Passengers, 4; Instructions, 8; Homicide, 10, 11; Criminal Law, 3, 7.

TRUST ESTATE. See Trusts and Trustees, 17.

TRUSTS. See Pleadings, 2; Constitutional Law, 2; Husband and Wife, 9; Trusts and Trustees.

Trusts—Parol Trusts—Declarations—Evidence.—A parol trust may be engrafted upon the title of a purchaser of land at a mortgage sale; and where the evidence is clear, cogent, and convincing, testimony of the declarations of purchaser made after the sale and transmission of the legal title to himself is not incompetent because resting in parol. *Williams v. Honeycutt*, 102.

TRUSTS AND TRUSTEES. See Trusts; Mechanics' Liens, 1; Evidence, 9; Statute of Frauds, 2; Contracts, 25; Sales, 2.

1. *Trusts and Trustees—Uses and Trusts—Adverse Claim—Limitation of Actions—Statutes.*—The statute of limitation will begin to run in bar of the rights of the *cestui que trust* from the time the trustee, with the knowledge of the *cestui que trust*, disclaims the trust, either expressly or by acts necessarily implying a disclaimer. *Rouse v. Rouse*, 171.

2. *Trusts and Trustees—Uses and Trusts—Active Trusts—Passive Trusts—Execution of Trusts—Statute of Uses—Right of Entry.*—A conveyance in trust to donor's son to pay over rents and profits to the donor for life and a certain amount thereafter to donor's wife in lieu of dower, and then directs a conveyance to donor's children, creates an active trust until the death of the wife, and thereafter it becomes passive, whereunder the heirs at law may demand the conveyance or enter upon the lands without it. *Ibid.*

3. *Same—Limitation of Actions—Statutes.*—Where a trust has become passive, entitling the heirs at law to a conveyance, or entry without it, and the trustee continues in possession of the lands under deeds from the heirs at law theretofore obtained he holds adversely to the heirs at law, in the sense that the statute of limitations will begin to run, and his continued adverse possession for the statutory periods will bar their right of action when they are under no legal disability. *Ibid.*

4. *Trusts and Trustees—Uses and Trusts—Ouster—Equity—Laches.*—The inaction of the *cestui que trust* for eleven years after the trustee has claimed the trust lands as his own under deeds he has acquired from

TRUSTS AND TRUSTEES—*Continued.*

them will bar their right of recovery in equity by their laches when they are under no legal disability. *Ibid.*

5. *Trusts and Trustees—Title.*—The trustee of an active trust must retain the title and control of the lands, subject to the trust in order to execute the user therein designated. *Ibid.*

6. *Trusts and Trustees—Parol Trusts—Mortgages—Sales—Purchasers.*—A parol agreement with the purchaser at or before the sale of land under mortgage that he will hold the title subject to repayment by the mortgagor creates a valid and enforcible parol trust in favor of the latter. *Wilson v. Jones*, 205.

7. *Same—Assignment of Bid—Options.*—Where the purchaser at a mortgage sale has agreed by parol with the mortgagor that he will hold the title subject to repayment by the latter, but, being unable to pay the purchase price, has assigned his bid to a third person, procured by the mortgagor, who acquires a deed for the land without knowledge or notice of the parol trust, but afterwards agrees with the mortgagor and purchaser at the sale that should the mortgagor pay a certain sum at a fixed time and the balance as specified he would convey the title to him: *Held*, such an agreement is an option, conferring no interest in the property itself until compliance, and the purchaser is entitled to the possession as against the mortgagor therein, who has failed to comply with the terms of the option. *Ibid.*

8. *Trusts and Trustees—Parol Trusts—Trials—Appeal and Error—Mortgages—Sales—Surplus—Pleadings.*—Where the plaintiff, a mortgagor, has failed in his suit to engraft a parol trust in his favor on the title acquired by the purchaser at the mortgage sale, and the cause has been tried solely on issues relevant thereto, the question of a recovery of the balance of the purchase price over and above the mortgage debt and costs of sale, though alleged in the answer, does not arise for determination on appeal. In this case the question is left, without prejudice, to be determined in an independent action, should it become necessary, and the mortgagor should thus proceed. *Ibid.*

9. *Trusts and Trustees—Mortgages—Deeds in Trust—Sales—Purchasers—Legal Title.*—The legal title to lands held in trust for the payment of a debt is in the trustee, and a purchaser at the sale made in pursuance of the power contained in the deed and in accordance with its terms is entitled to the possession in an action brought to recover it. *Holden v. Houck*, 235.

10. *Same—Equity.*—Where land is conveyed in trust to secure the payment of a debt, a purchaser at the sale thereof made in pursuance of the lawful power and terms therein expressed, acquires both the legal and equitable title, when the sale had been conducted with perfect fairness, every one had full opportunity to bid and buy, and there is no evidence of suppression or chilling of biddings. *Ibid.*

11. *Same—Injunction.*—An injunction served at the sale upon the trustee in a deed of trust to secure the payment of a debt, in this case after the bidding had closed, when it appears to the court that the sale was perfectly fair and regular and in accordance with the lawful terms and conditions expressed in the deed, is improvidently issued; and while the trustee should have observed it, if served in time, the courts

TRUSTS AND TRUSTEES—*Continued.*

will not set aside the sale in an action by the purchaser for the possession of the land, the trustor, the defendant in the action, having no real equity to protect and no substantial defense to set up. *Ibid.*

12. *Trusts and Trustees—Deeds and Conveyances—Mortgages—Corporations—Receivers—Courts.*—Where a corporation is insolvent has ceased to do business for a term of years and is permanently closed down, with the property constantly depreciating and inadequate to pay its bonded debt, a receiver will be appointed, at the suit of the bondholders, with an order of sale; and where the bonds are held by one person or corporation, provisions in the deed of trust requiring a concurrence in writing of a certain number of bondholders, or inserted merely for the protection or direction of the trustee or to safeguard the interest of minority bondholders, are immaterial. *Bank v. Mfg. Co.*, 318.

13. *Same—Equity—Sales.*—The equity jurisdiction of our courts over mortgages and deed in trust securing a debt cannot be taken away or injuriously limited by any agreement therein of the parties as to sale and redemption, the power of sale in the instrument being regarded as a cumulative remedy, and the provisions of the instrument are given consideration and effect only in the adjustment of the equities involved. *Ibid.*

14. *Trusts and Trustees—Creditors—Reconveyances of Trust Estate—Notice—Deeds and Conveyances.*—A grantor of lands in trust for creditors to pay off all outstanding mortgages and encumbrances and all other debts and obligations, who takes a reconveyance of the land under an erroneous recitation in the deed of the trustee that the trusts have been fully administered, is, notwithstanding, fixed with notice of an outstanding obligation, especially when coming within the terms of the trust deed at the time of the reconveyance a party defendant to an action to recover it. *Geitner v. Jones*, 542.

15. *Same—Payment—Burden of Proof.*—Where a trustee in a deed conveying lands to pay the grantor's creditors endorses on a note theretofore given by the debtor that it was secured by the trust deed, and, pending an action for the foreclosure of the deed in trust, reconveys the land to the grantor, erroneously reciting the full administration and discharge of his trust, in an action upon the note the burden of proving payment is upon him. *Ibid.*

16. *Trusts and Trustees—Reconveyance of Trust Estate—Admission of Funds—Notice—Burden of Proof—Deeds and Conveyances.*—Where the trustee in a deed to lands for the benefit of creditors reconveys the land to the trustor, reciting that the trusts therein have been fully performed, the trustee's recitation in his deed is evidence that he has some funds out of which to pay the trustor's debts remaining unpaid, and the grantee in the reconveyance is bound by its terms, and the burden of his plea of payment is upon him. *Ibid.*

17. *Trusts and Trustees—Deeds and Conveyances—Trust Estate—Reconveyance—Beneficiaries—Creditors—Consent—Foreclosure—Deeds and Conveyances.*—A trustee in a deed conveying lands to secure the grantor's creditors cannot reconvey the lands to the trustor free from the trusts imposed, except with the consent of the beneficiary; and

RUSTS AND TRUSTEES—*Continued.*
the beneficiary may maintain his suit to foreclose upon the lands as the real party in interest. *Ibid.*

LTERIOR DEVISE. See Estates, 2.

LTRA VIRES. See Corporations, 5; Banks and Banking, 1, 2, 3.

NDISCLOSED PRINCIPAL. See Principal and Agent, 1.

NDUE INFLUENCE. See Evidence, 37.

SER. See Easements, 1.

SES AND TRUSTS. See Trusts and Trustees, 1, 2, 3; Constitutional Law, 2.

ARIANCE. See Pleadings, 2, 4.

ENDOR AND PURCHASER. See Contracts, 1, 11, 13, 20, 22, 23, 25, 32; Landlord and Tenant, 3; Negotiable Instruments, 1; Sales, 3.

1. *Vendor and Purchaser—Contracts, Written—Parol Evidence—Warranty—Defense—Counter-claim.*—Where a written contract of sale of a cotton ginning outfit contains the stipulation that the purchaser should provide sufficient motive power for its operation, if the same were not furnished by the seller, and the purchaser has undertaken to provide the same, with further stipulation that the writing is exact and entire, and no agreement or understanding, verbal or otherwise, will be recognized unless therein contained: *Held*, parol agreements as to the daily capacity of the gin operated by a certain engine the purchaser had used under the salesman's representation as to its sufficiency for the purpose, is contradictory of and excluded by the terms of the writing; and in the absence of sufficient allegation or evidence to cancel the writing or of fraud and deceit, the parol agreement is not available to the purchaser either by way of defense or counter-claim for damages sustained. *Murray v. Broadway*, 149.

2. *Vendor and Purchaser—Explosives—Soft Drinks—Bottling Under Pressure—Duty of Vendor—Burden of Proof—Reasonable Care—Instructions—Appeal and Error.*—In an action by the purchaser to recover damages from the manufacturer of ginger ale in glass bottles filled under high gas pressure, it is *Held* that the manufacturer owes the dealer and his purchaser the duty to use reasonable precaution to see that the bottles may be safely handled in the ordinary manner, which is for the defendant to show; and a charge by the court that restricted its liability to the methods, etc., used by other like manufacturers, whose bottles had been shown to frequently explode, does not meet the requirement, and is reversible. *Grant v. Bottling Co.*, 256.

3. *Vendor and Purchaser — Fertilizer — Contract — Breach — Measure of Damages — Evidence — Market Price.*—Upon vendor's breach of contract of sale and delivery of fertilizers from 1 September to 30 November of a certain year, the measure of damages is the difference in the contract and market price at the time and place of delivery; and evidence of the market price during the following spring of the year is irrelevant and incompetent. *Warehouse Co. v. Chemical Co.*, 509.

4. *Vendor and Purchaser — Contracts — Delivery — Time Specified — Later Date—Refusal of Acceptance—Time the Essence.*—Where a contract

VENDOR AND PURCHASER—*Continued.*

of sale and delivery of goods to the purchaser states the time upon which the seller shall deliver them, time is to be regarded as of the essence of the contract, and the purchaser may refuse to accept and pay for the goods tendered for delivery at a later date. *Sign Works v. Phonograph Co.*, 536.

5. *Vendor and Purchaser—Injunction—Costs—Appeal and Error.*—Where the purchaser of merchandise has stopped payment of his check at the bank after the seller has endorsed it, claiming that the latter could not make delivery, and the seller having the check in his possession has been restrained from using it, but deposits it in court with tender of delivering the merchandise: *Held*, the restraining order was proper to the time the check was deposited in court, and the costs properly taxed to that time and not thereafter; and *Held, further*, the costs on appeal should be equally divided between the parties. *Bridger v. Brett*, 683.

VENUE. See Appeal and Error, 34.

Venue—Title to Lands—Exchange of Lands—"Boot"—Pecuniary Considerations — Transfer of Causes — Removal of Causes.—Where the parties have agreed to an exchange of land, and that plaintiff should be paid in addition a certain price per acre for all of his lands lying beyond a defined line thereon, and accordingly a survey has been made, deeds given, and the "boot" paid in money, an action to recover the price for a greater acreage than that ascertained by the surveyor, upon allegation of mutual mistake induced by his error in making the calculation, is not one involving the title to land, which should be brought in the county where the land is situated. *Griffin v. Barrett*, 473.

VERDICT. See Mortgages, 1; Carriers of Passengers, 3; Courts, 5; Appeal and Error, 39, 44, 50, 52; Instructions, 5; Homicide, 10; Criminal Law, 11, 12.

1. *Verdict—Findings.*—The findings of the jury to the issues should be examined in connection with the pleadings, evidence and the judge's charge, and in this case they are *Held* not to be conflicting, but sufficient to settle the rights of the parties. *Southerland v. Brown*, 187.

2. *Verdicts—Interpretation—Instructions—Evidence.*—The verdict of the jury will be interpreted and allowed significance by reference to the testimony and charge of the court. *Jones v. R. R.*, 260.

3. *Same—Railroads—Flying Switch—Independent Cause—Negligence.*—In an action by an employee of a railroad to recover damages for an injury received by him while engaged as brakeman on a freight train making a flying switch, there was evidence tending to show that the injury was caused by an unnecessary and sudden stop of the train; and to this latter the judge in his charge restricted the consideration of the jury on the question of the defendant's actionable negligence: *Held*, the verdict was not objectionable on the ground that the making of the flying switch was made an independent subject of such negligence and recovery allowed thereon, though an allegation in the complaint may have so regarded it. *Ibid.*

VERDICT DIRECTING. See Insurance, Fire, 2.

WILLS—*Continued.*

cance, and that the income from the land would support the wife, requires that the son, to get the benefits under the will, shall comply with its terms for the whole of the period stated, signifying that the "one hundred dollars a year" should become a charge both on the real and personal "estate" at the death of the wife, and that the use of the words "one hundred dollars a year" was not intended as synonymous with "annually," but prescribed a method of ascertaining the amount to be paid to the son, who had fully complied with the requirement designated. *Ibid.*

WITNESSES. See Appeal and Error, 2; Courts, 2; Evidence, 7, 39, 47; Criminal Law, 2.

1. *Witnesses— Adverse Parties— Commission— Statute—Pleadings— Evidence — Supporting Affidavit — Waiver.*— Where an adverse party, sought to be examined before a commissioner as a witness, before pleadings filed, excepts to the proceedings for the lack of a supporting affidavit, the exception should be sustained; but the irregularity may be waived by his not excepting to an order made at the next term of the court, requiring him to answer and taking advantage of a further and invalid provision therein. *Cartright v. R. R.*, 36.

2. *Same— Rights of Parties— Presence— Examination.*—Where the court has entered an order that an adverse party answer questions he had refused to answer before a commissioner appointed under the provisions of the Revisal, sec. 856, a further provision that the party would be deemed to have complied if he thereafter filed answer under oath, deprives the examining party of his right to be present for cross-examination, etc., and is contrary to the provisions of Revisal, sec. 865, requiring that such examination must be in the same manner and subject to the same rules as applicable to other witnesses, etc. *Ibid.*

WORDS AND PHRASES. See Homicide, 7.

WRITING. See Insurance, 7; Appeal and Error, 3; Statute of Frauds, 2; Contracts, 27, 28.

WRITS. See Actions, 5, 6.

WRITS OF ERROR. See Appeal and Error, 8.

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